



**Title**

**STRENGTHENING THE REGULATION REGIMES FOR  
COLLECTING SOCIETIES IN SOUTH AFRICA AND NIGERIA:  
ANY ROOM FOR COMPETITION LAW?**

**by**

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## **DEDICATION**

To the evergreen memory of my late parents – Mr. Johnbull Oriakhogba Iyere and Mrs. Roselyn Iyere for instilling in me the virtues of hard-work and perseverance, and my late sister –Mrs. Violet Onakpoma – who stood in as my mother during some very trying moments in my life.

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## ABSTRACT

Collective management organisations (CMOs), also known as collecting societies, are natural monopolies and they occupy dominant positions, with anticompetitive tendencies if not regulated, in the copyright management and licensing market. Regulation regimes must thus set efficiency, transparency and accountability standards for CMOs. In achieving these standards, competition law aims to address specific concerns through the regulation of CMOs' capacity to limit copyright owners' economic rights, discriminate against them in terms of membership, and fix excessive and discriminatory royalty rates for users. CMOs in Nigeria and South Africa are subject to copyright-sector specific regulation. Nigeria and South Africa have competition legislations, which applies in principle, but has so far not been applied to CMOs in practice.

Undertaken as desk and library based study, the thesis examines the regulation of CMOs in Nigeria and South Africa. It determines if the regulation in both countries empower the relevant copyright regulatory agency to address the competition-related concerns in regards to CMOs and whether there is need to apply competition law to CMOs in both countries. The thesis explores the copyright and competition law interface. It argues that, although adopting different methodologies, both fields pursue the similar goal of promoting creativity by enhancing dynamic competition in copyright markets which underscores the regulation of CMOs. It concludes that whereas competition law does not need to be applied to CMOs in Nigeria, there is need to apply it to CMOs in South Africa because unlike its Nigerian counterpart, there are observable gaps in the South African copyright regime in the treatment of the competition-related concerns of CMOs.

At the time of writing this thesis, both Nigeria and South Africa are reviewing their copyright legislation. CMOs regulation is a major issue being considered in the process. The thesis will be indispensable, the author hopes, in determining the form and content of CMOs regulation in both countries. Further, there is scarcity of literature in Nigeria and South Africa on the copyright and competition law interface relating to CMOs regulation. The thesis will fill this gap and form an invaluable resource for further research; a useful guide for copyright and competition law regulators and enforcers; and a rich reference material for academics, judges and policy makers in Nigeria and South Africa.

## ABBREVIATIONS

AJIC	African Journal of Information and Communication
AJIP	African Journal of Intellectual Property
ALJ	Antitrust Law Journal
All SA	All South African Report
ALR	Arizona Law Review
APR	African Publishing Review
ARIPO	African Regional Intellectual Property Organisation
ASCAP	The American Society of Authors, Composers and Publishers
AUILR	American University International Law Review
AVRS	Audio-Visual Rights Society
BIEM	The International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction
BJLP	Baltic Journal of Law and Politics
BLR	Beijing Law Review
BMI	Broadcast Music Incorporated
CAL LR	California Law Review
CAPASSO	Composers, Authors and Publishers Association
CCLI	Christian Copyright Licensing International



CISAC	International Confederation of Societies of Authors and Composers
CIPC	Companies and Intellectual Property Commission
CJEL	Columbia Journal of European Law
CJIL	Chicago Journal of International Law
CJLA	Columbia Journal of Law and Arts
CJLT	Canadian Journal of Law and Technology
CLB	Commonwealth Law Bulletin
CLR	Chicago-Kent Law Review
CLS	Copyright Law Symposium
CMO	Collective Management Organisations
CMRWIPO	Copyright Monthly Review of the WIPO
COSON	Copyright Society of Nigeria
CPLR	Competition Law Report
CR	Copyright Reporter
DALRO	Dramatic, Artistic and Literary Rights Organisation
DLR	DePaul Law Review
Dr LR	Drake Law Review
DRL	Drake Law Review
ECR	European Community Report
EILR	Emory International Law Review
EIPR	European Intellectual Property Review
EJC	European Journal of Communication
eKLR	Electronic Kenyan Law Report
ELR	Entertainment Law Review

FAS	F©S Articles and Studies
FIPMELJ	Fordham Intellectual Property, Media and Entertainment Law Journal
FLR	Fordham Law Review
GLJ	Georgetown Law Journal
GMLR	George Mason Law Review
GRBPL	Gravitas Review of Business and Property Law
Harvard LR	Harvard Law Review
HCELJ	Hastings Communication and Entertainment Law Journal
HLR	Houston Law Review
IAMT	International Association for Management of Technology Conference Proceedings
IBJCLI	Idah Bar Journal of Contemporary Legal Issues
ICS	Information, Communication and Society
IFPI	International Federation of the Phonographic Industry
IFRRO	International Federation of Reproduction Rights Organisations
IIC	International Review of Intellectual Property and Competition Law
IJCL	Ife Journal of Comparative Law
IJGLS	Indiana Journal of Global Legal Studies
IJMBR	International Journal of Music Business Research
IJRCI	International Journal of Research and Scientific Innovation

IJRRE	International Journal of Research and Reviews in Education
IMPRA	Independent Music Performance Rights Association
IPJ	Intellectual Property Journal
IPLR	Intellectual Property Law Report
IPR	Intellectual Property Rights
IPR	Internet Policy Review
IPRJIR	Internet Policy Review Journal on Internet Regulation
IRLCT	International Review of Law, Computers and Technology
JCE	Journal of Cultural Economics
JCLE	Journal of Competition Law and Economics
JCRL	Journal of Contemporary Roman-Dutch Law
JCSU	Journal of the Copyright Society of the U. S. A
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law
JIPL	Journal of Intellectual Property Law
JIPLP	Journal of Intellectual Property Law and Practice
JIPR	Journal of Intellectual Property Rights
JLE	Journal of Law and Economics
JLS	Journal of Legal Studies
JMEIEA	Journal of the Music & Entertainment Industry Educators Association

KSUBJPL	Kogi State University Bi-Annual Journal of Public Law
LCP	Law and Contemporary Problems
LLJ	Law Library Journal
LPELR	Law Pavilion Electronic Law Report
MALR	Media and Arts Law Review
MCPL	Motion Picture Licensing Company
MCPS	Musical Copyright Protection Society
MCSLLS	Mississippi College School of Law, Legal Studies
MCSN	Musical Copyright Society Nigeria
Melbourne ULR	Melbourne University Law Review
MLR	Michigan Law Review
MPIPCL	Max Planck Institute for Intellectual Property and Competition Law
MSILR	Michigan State International Law Review
MUJLT	Masaryk University Journal of Law and Technology
MULR	Monash University Law Review
NAUJILJ	Nnamdi Azikiwe University Journal of International Law and Jurisprudence
NCC	Nigerian Copyright Commission
NIPJD	Nigerian Intellectual Property Judgments and Decisions
NJBL	NIALS Journal of Business Law
NJIP	NIALS Journal of Intellectual Property
NWLR	Nigerian Weekly Law Report
PAIST	Proceedings of the Association for Information Science and Technology

PER/PELJ	Pochefstroom Electronic Law Journal
PIJIP	Program on Information Justice and Intellectual Property
PLLT	Public Law and Legal Theory
PMRS	Performing and Mechanical Rights Society
POSA	Performers' Organisation of South Africa
PRS	Performing Rights Society
PSBS	Procedia-Social and Behavioral Sciences
RAV	RiSA Audio-visual
REPRONIG	Reproduction Rights Society of Nigeria
RERCI	Review of Economic Research on Copyright Issues
RIO	Review of Industrial Organizations
RiSA	Recording Industry of South Africa
SAIPLJ	South African Intellectual Property Law Journal
SALJ	South African Law Journal
SAMLJ	South Africa Mercantile Law Journal
SAMPRA	South African Music Performance Rights Association
SAMRO	Southern African Music Rights Organisation
SARRAL	South African Recording Rights Association Limited
SCR	Supreme Court Reports
SLR	Stanford Law Review

SODRAC	Society of the Reproduction Rights of Authors, Composers and Editors in Canada
TIPLJ	Texas Intellectual Property Law Journal
UCFLLS	University of Copenhagen Faculty of Law Legal Studies
UIJPBL	University of Ibadan Journal of Private and Business Law
Unimaid LJ	University of Maiduguri Law Journal
UOLTJ	University of Ottawa Law and Technology Journal
VLR	Virginia Law Review
VULJJ	Victoria University Law and Justice Journal
WIPOJ	World Intellectual Property Organisation Journal
WJLTA	Washington Journal of Law, Technology and Arts
WMLR	William and Mary Law Review
YEEH	Yearbook of Eastern European History
ZACAC	South African Competition Appeal Court
ZACC	South African Competition Commission
ZACT	South African Competition Tribunal
ZAGPPHC	South Africa: North Gauteng High Court, Pretoria
ZASCA	South African Supreme Court of Appeal

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## CHAPTER ONE: GENERAL INTRODUCTION

### 1.1 Objective and relevance of the research

In both Nigeria and South Africa, collective management organisations (CMOs)<sup>1</sup> operate in the copyright management market, that is their relationship with copyright owners, and the licensing market, that is their relationship with copyright users. The rights acquired by CMOs and their capacity to solve the problems of transaction costs, associated with copyright licensing, by deploying economies of scale and scope make them natural monopolies in both markets.

From an economic perspective, the term *natural monopoly* connotes a market in which high infrastructure or transaction costs, among others, in relation to the size the market, confers a firm with the largest supply capacity an overwhelming advantage over potential competitors.<sup>2</sup> This usually happens in markets where large capital costs create economics of scale vis-à-vis the size of the given market. Simply put, the notion of natural monopoly describes a market in which only one firm can endure through competition as a result of the costs associated with the demand and supply structure of the market.<sup>3</sup> Further, a natural monopoly may manifest as a *de facto* or *de jure* monopoly.<sup>4</sup> A *de facto* monopoly may be described as a firm that gained dominance in a given market owing to there being only a few or no competitors or because of the high demand for its goods or services and its capacity to meet the demand. Such monopoly is not created by governmental intervention, but by market forces.<sup>5</sup> This distinguishes a *de facto* monopoly from a *de jure* monopoly, which is a monopoly

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<sup>1</sup> Collective management organisations (CMOs) have been referred to differently as collecting societies, collective rights management organisations, copyright collective societies, among others. Whatever the term used, they refer to the same entities as briefly defined in 2.2 below. The Nigerian and South African legal regimes for collective management adopt the terms “collecting societies”. However, the term CMO is generally adopted here because it is more widely utilised in the scholarship on the subject. However, for ease of reference and for purpose of emphasis, the terms CMO and collecting societies would be used interchangeably in the course of the thesis.

<sup>2</sup> J Perloff *Macroeconomics* (2012) 394.

<sup>3</sup> S Ghosh ‘Decoding and recoding natural monopoly, deregulation, and intellectual property’ (2008) 4 *University of Illinois Law Review* 1125-1184.

<sup>4</sup> RA Ghosh ‘An economic basis for open standards’ (2005) available at [https://www.intgovforum.org/Substantive\\_1st\\_IGF/openstandards-IGF.pdf](https://www.intgovforum.org/Substantive_1st_IGF/openstandards-IGF.pdf), accessed on 1 March 2019.

<sup>5</sup> Ibid.

created by the government and statutorily prevented from competition.<sup>6</sup> *De jure* monopoly is usually conferred on public utility firms and as shown in the course of this work, CMOs exist in some countries as *de jure* monopolies. The concept of natural monopoly will be better appreciated in 2.3.4 below where the CMOs' competition concerns are discussed.

For now, it should be noted that within the context of collective management of copyright and related rights, the notion of natural or *de facto* monopoly does not indicate the non-existence of other CMOs or other firms (such as online rights aggregators) within a given copyright management and licensing market for the same class of copyright. The natural monopoly concept only justifies the need for regulation, and determines the shape of the regulatory framework, in order to prevent the CMOs from limiting competition in collective management and licensing market.

Standard economics suggests the need for government intervention in the form of regulation of natural monopolies in order to promote efficiency in the given market.<sup>7</sup> The need to pursue public policy goals and outcomes such as 'income distribution, essential services, cross-subsidization and taxation' by regulation is another important reason advanced by standard economics for the regulation of natural monopolies.<sup>8</sup> However, there are scholars who believe that regulation of natural monopolies can itself lead to inefficiencies in the market as it is difficult sometimes to adopt a more effective regulatory approach. To these scholars, every market (through the forces of price, demand and supply) has the capacity to regulate itself and prevent the market failures that government supervision is meant to achieve.<sup>9</sup> Within the context of collective management, this thesis contends in 2.4.3 below that given the nature of the collective management and licensing market, it is important to subject CMOs, which are monopolies, to regulation to ensure efficiency and the promotion of creativity and social welfare. The competition concerns raised by CMOs monopolistic nature and the

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<sup>6</sup> Ibid.

<sup>7</sup> RD Tollison and RE Wagner 'The logic of natural monopoly regulation' (1991) 17(4) *Eastern Economic Journal* 483-490; BWF Depooter 'Regulation of Natural Monopoly' (1999) available at <https://reference.findlaw.com/lawandeconomics/5400-regulation-of-natural-monopoly.pdf>, accessed on 5 March 2019; PL Joskow 'Regulation of natural monopolies' (2005) available at <https://economics.mit.edu/files/1180>, accessed 5 March 2019.

<sup>8</sup> Joskow Ibid.

<sup>9</sup> H Ergas 'Why Johnny can't regulate: the case of natural monopoly' (2013) 20(1) *Agenda: A Journal of Policy Analysis and Reform* 47-54.

approach that competition law adopts in addressing these concerns are also highlighted in 2.4.3 below.

Indeed, as will be shown in the course of this thesis, CMOs, as natural monopolies, have been judicially accepted from a competition law perspective as ‘necessary evils’ because of their functions within the copyright management and licensing market. Thus, within the context of collective management, the question is not so much as to whether or not CMOs should be allowed to exist as natural monopolies. The emphasis is on regulating the exercise of their monopoly so that they do not limit competition within the copyright management and licensing markets.

As natural monopolies, CMOs occupy a dominant position in the copyright management and licensing market which, if not curtailed, may be abused to the detriment of copyright owners and users. To prevent such abuse, CMOs have been subjected to different forms of regulatory frameworks which have been developed in different countries. While some countries adopt copyright-sector specific regulatory frameworks, others adopt a dual-sector framework of copyright law on the one hand, and competition law on the other hand. The Nigerian and South African regulatory frameworks are copyright-sector specific. Whatever the approach adopted, the main objective of regulating CMOs is to prevent them from abusing their monopoly by subjecting them to efficiency, transparency and accountability standards in their relationship with copyright owners, users, and among themselves. In pursuit of this objective, competition law seeks to address specific competition concerns such as the abuse of market dominance, excessive pricing (royalties), unreasonable restraint on copyright owner’s exclusive rights, refusal to license, refusal to accept copyright owners as members, discrimination between copyright owners and discrimination between users, among others in the copyright markets. To this end, CMOs are scrutinised under the rules against restrictive agreements, abuse of market dominance and merger control. On the other hand, copyright-sector specific regulations protect the interest of copyright owners and users from the conduct of CMOs within the copyright system by subjecting CMOs to defined modes of operation.

Therefore, the objective of this thesis is to examine the regulation of CMOs in Nigeria and South Africa to determine if the regulatory frameworks in both countries empower the relevant copyright sector-specific regulatory bodies to address the competition concerns in the copyright management and licensing market. The research

will determine if there is a need to also apply competition law to CMOs in both countries.

This research is very important for several reasons. First, copyright sector-specific regulatory frameworks and competition law may substitute or complement each other in regulating CMOs. They may substitute each other depending on the specific conducts of CMOs in focus: conduct regarded as anti-competitive such as abuse of dominance in a given collective management and licensing market, or copyright-related conducts such as licensing claims and procedures. On the other hand, they may complement each other if the focus is on a specific conduct, such as royalty setting, sanctioned by copyright but which raises competition concerns. The foregoing raises questions as to how copyright and/or competition law may be applied to CMOs and the merits and demerits of each legal framework in the regulation of CMOs, as discussed in 2.5 below.<sup>10</sup>

Secondly, Nigeria and South Africa are in the process of reviewing their respective copyright legislation and the regulation of CMOs is one of the main issues being considered in the process. Thus, the outcome of this research will be a valuable resource in the determination of what the regulatory framework for CMOs in both countries should address. Secondly, literature preponderates on the intersection between copyright sector-specific regulation and competition law on the regulation of CMOs from a European Union (EU) and other active competition law jurisdictions, such as USA. However, there is a huge literature gap in Nigeria and South Africa in this regard. Therefore, the research strives to fill this gap and provide useful guidance for copyright and competition law enforcers when determining whether or not to exclude or exempt CMOs from the application of the competition laws in Nigeria and

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<sup>10</sup> For a general Discussion on the sector-specific regulation defense under competition law and related issues, see P Congedo ‘The “regulatory authority dixit” defence in European competition law enforcement’ (2014) MPRA Paper No. 60239 available at [https://mpra.ub.uni-muenchen.de/60239/1/MPRA\\_paper\\_60239.pdf](https://mpra.ub.uni-muenchen.de/60239/1/MPRA_paper_60239.pdf), accessed on 1 March 2019; RD Nair et al ‘The inter-relationships between regulation and competition enforcement in the South African liquid fuels industry’ (2015) 26(1) *Journal of Energy in Southern Africa* 11-19; A de Streel ‘The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications’ (2008) available at <https://pdfs.semanticscholar.org/2d16/db27d8d021ff051e653cfd039549664b8453.pdf>, accessed on 1 March 2019; M Hellwig ‘Competition Policy and Sector-Specific Regulation for Network Industries’ (2008) available at <https://pdfs.semanticscholar.org/b0ae/a9587db5efbcd8b21ba5aeb3b6bc67a82f6.pdf>, accessed on 1 March 2019.

South Africa. Also, it will form an indispensable resource for further research in this area in Nigeria and South Africa.

Finally, the research does not intend to examine the level of compliance with the regulatory frameworks for CMOs in Nigeria and South Africa. Such examination would require some empirical study, which is beyond the scope of the research.

## **1.2 Research questions**

The overarching questions this thesis seeks to resolve are whether the current regulation regime for CMOs in Nigeria and South Africa empowers the relevant copyright sector-specific regulatory bodies to address the CMOs' competition concerns in the copyright management and licensing markets in both countries; and if not, whether there is a need to apply competition law in regulating CMOs in both countries. These issues underscore the main objective of the thesis as highlighted in 1.1 above.

To effectively address these issues, it is important to first examine the justification for the emergence and continued existence of CMOs as natural monopolies in the copyright management and licensing markets, the functions performed by CMOs and the rationale for regulating CMOs. In this regard, particular focus will be on the different forms of regulatory frameworks for CMOs, the main objective of regulating CMOs and the specific CMOs' competition concerns within the copyright management and licensing markets will be determined. Secondly, the current regulation of CMOs in Nigeria and South Africa will be examined with the aim of determining how, if at all, CMOs' competition concerns have been addressed by the regulatory frameworks. Thirdly, the thesis will examine competition in the collective management's landscape and how competition law has been applied to address the specific CMOs' competition concerns. It will then determine, if necessary, whether competition law should be applied to CMOs in Nigeria and South Africa.

In summary, to resolve the overarching issues, the following specific questions will be addressed in this thesis:

- a. How and why has collective management of copyright and related rights, and the regulation thereof, developed into its current forms?
- b. What, if any, are the key competition concerns that arise out of the dominant position that CMOs hold in the copyright management and licensing markets?

- c. Does the Nigerian copyright sector-specific regulatory framework for CMOs empower the relevant copyright sector-specific regulatory body to address the CMO's competition concerns in the copyright management and licensing market in Nigeria?
- d. Does the South African copyright sector-specific regulatory framework for CMOs empower the relevant copyright sector-specific regulatory bodies to address the CMO's competition concerns in the copyright management and licensing markets in South Africa?
- e. How does competition law address the key CMOs' competition concerns in the copyright management and licensing markets?

### **1.3 Research methodology**

As gleaned from the research objectives and questions at 1.1 and 1.2, this thesis primarily sets out to determine if the copyright sector-specific regulatory framework for CMOs in South Africa and Nigeria empower the relevant copyright regulatory bodies to address the competition concerns of CMOs in the copyright management and licensing market in both countries; and whether there is a need to resort to competition law in regulating CMOs. To this end, the research adopts a doctrinal methodology. It is undertaken by way of desk and library-based study. The research examines primary legal sources including relevant South African and Nigerian statutes and regulations; judicial authorities; relevant government policy statements from both countries; and relevant international copyright instruments.

To address the overarching issues, the thesis will also discuss the interface of copyright and competition law and how it impacts on the regulation of CMOs in Nigeria and South Africa. Relevant judicial authorities on this issue are lacking in South Africa and Nigeria. To appreciate the issues, the thesis relies on case law from India, especially as it relates to the broad discourse of the interface between copyright and competition law undertaken in chapter five of the thesis. The choice of India is informed, firstly, by the fact that it is a developing country like Nigeria and South Africa; and secondly by the fact that it has a robust jurisprudence on the copyright-competition law interface which Nigeria and South Africa can draw from when considering issues relating to the copyright-competition law interface. However, India's jurisprudence is not robust enough to be relied upon when determining the specific issue of how the copyright-competition law interface impacts on the regulation

of CMOs in Nigeria and South Africa. Further, the thesis briefly refers to the law and practice in Kenya within the context of the discussion at 3.5.4 on how to restructure collective management to resolve the regulatory challenge around number of CMOs per class of copyright in the Nigerian music industry.

Thus, one has to look to other jurisdictions with established jurisprudence on the application of competition law in the regulation of CMOs. The Court of Justice of the European Union's (CJEU) jurisprudence is important in this regard. The CJEU has developed a rich jurisprudence on the copyright-competition law interface and how this relates to the regulation of CMOs. The CJEU's jurisprudence has been largely codified in the EU Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014, the relevant provisions of which will be relied upon in the course of this work. The USA is another important jurisdiction relied upon in the course of this work. The country has a long and established history, substantial case law and body of literature on the application of competition principles to CMOs. Indeed, competition principles formed the major source of regulating CMOs in the USA. Competition law also shaped other frameworks, such as the consent decrees and the Musical Works Modernisation Act 2018, through which CMOs are regulated in the USA.

It is important to note that, according to industry reports, the collective management and licensing market in the USA and most countries, such as France, the United Kingdom and Germany, under the jurisdiction of the CJEU are more developed than those of Nigeria and South Africa in terms of size of the markets and earnings of CMOs, among others.<sup>11</sup> Thus, the initial reaction to reliance on the CJEU's and USA's jurisdiction to determine the research questions within the Nigerian and South African contexts would be that of circumspection. However, from a competition law perspective, there is no real difference in terms of the capacity of CMOs to occupy dominant positions, neither is there any distinction in terms of the competition concerns

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<sup>11</sup> See CISAC *Global Collections Reports 2018 for 2017 Data* (2018) available at <https://www.cisac.org/CISAC-University/Library/Global-Collections-Reports/Global-Collections-Report-2018>, accessed on 1 March 2019; WIPO *WIPO Studies on the Economic Contribution of the Copyright Industries: An Overview* (2014). For South Africa, see A Pouris and R Inglesi-Lots *The Economic Contribution of Copyright-based Industries in South Africa* (WIPO Report, 2011). No such study on Nigeria yet, but see NCC 'Medium term corporate plan and strategy (2012-2014)' available at [http://kyg.nigeriagovernance.org/Attachments/Organization/Mtss/158\\_MTSS\\_Nigerian%20Copyright%20Commission%20\(NCC\).pdf](http://kyg.nigeriagovernance.org/Attachments/Organization/Mtss/158_MTSS_Nigerian%20Copyright%20Commission%20(NCC).pdf), accessed on 3 March 2017



raised by CMOs, in the copyright management and licensing markets of the countries. And since there is a huge gap in both literature and case law on the application of competition law in the regulation of CMOs in Nigeria and South Africa, it is appropriate to resort to the established CJEU and USA jurisprudence on the subject for useful guide. This approach finds support in s1(3) of the South African Competition Act (SA Competition Act),<sup>12</sup> which enables reliance on appropriate foreign and international law for the interpretation and application of the SA Competition Act.<sup>13</sup> The Nigerian Federal Competition and Consumer Protection Act, 2018 (Nigerian Competition Act) does not contain a section similar to s1(3) of the SA Competition Act. Nonetheless, reliance can still be placed on foreign jurisprudence as guide in interpreting relevant provisions of the Nigerian Competition Act. This is so because Nigerian courts usually refer to foreign case law, as persuasive authorities, especially where the foreign case law interpreted a statutory provision similar to the one being applied by the Nigerian court.<sup>14</sup>

Finally, the thesis relies on relevant secondary sources such as academic literature, official reports of relevant studies, newspaper reports and online sources. There is paucity of literature and case law on CMOs in South Africa and Nigeria that have addressed the above questions. Thus, in answering the questions, this research draws substantially from the Max Planck Institute for Innovation and Competition Report on *Copyright, Competition and Development*, 2013 (Max Planck Report) mandated by the World Intellectual Property Organisation (WIPO). The Max Planck Report was based largely on the case law and practice of the European Commission, the CJEU, and some national competition jurisdictions in other parts of the world, including the USA. It is the most extensive and authoritative study in this regard.

#### **1.4. Summary of research context**

The following CMOs operate in Nigeria: Musical Collecting Society Nigeria (MCSN), Copyright Society of Nigeria (COSON), Reproduction Rights Society of Nigeria

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<sup>12</sup> Competition Act, No 89 of 1998

<sup>13</sup> OECD *Competition Law and Policy in South Africa* (2003) 9-10 available at <https://www.comptrib.co.za/assets/Uploads/Reports/South-Africa-Peer-Review.PDF>, accessed on 15 July 2018.

<sup>14</sup> Foreign case law is relied upon by Nigerian courts, when interpreting local statutes, as persuasive authorities. That is, they are relied as guide and not binding authorities. See *Basinco Motors Ltd v Woermann-Line* (2009) LPELR S.C. 24/2003

(REPRONIG) and Audio-Visual Rights Society (AVRS) of Nigeria. They fall under the supervision of the Nigerian Copyright Commission (NCC) pursuant to the Nigerian Copyright Act,<sup>15</sup> the Copyright (Collective Management Organisations) Regulations, 2007 (CMO Regulations) and the Company and Allied Matters Act (CAMA).<sup>16</sup>

The Nigerian Competition Act was assented to by the Nigerian President in February 2019. Before then, only some sectoral competition regulations existed in Nigeria.<sup>17</sup> In terms of s164 of the Nigerian Competition Act, the existing sectoral competition regulations will now be read and applied in such a way as to bring them in conformity with the Nigerian Competition Act.

It was argued elsewhere that the UK Statute of Monopolies 1623 (the Statute),<sup>18</sup> is applicable in Nigeria as a statute of general application.<sup>19</sup> Being a former British colony, the English common law, doctrines of equity and statutes of general application in force in England on 1 January 1900 were received in Nigeria subject to the express provision of any federal law.<sup>20</sup> In the light of the enactment of the Nigerian Competition Act and for the following reasons, this argument is no longer sustainable.

First, the Statute has been incrementally repealed in the UK. Section 5 thereof was first repealed by the Statute Law Revision Act 1868 followed by the repeal of ss10 to 12 through the Patents, Designs and Trademarks Act 1883. The Administration of Justice Act 1965 repealed s8 of the Statute, while ss2 to 4 were repealed by the Statute Law (Repeals) Act 1969. Only ss6, 7 and 9 containing exceptions and s1 of the Statute are extant. Consequently, the repeals in respect of ss2 to 4 and 10 to 12 of the Statute are unenforceable in Nigeria since they were done pursuant to laws enacted after 1 January 1900. Further, only ss1 to 4, 6, 7 and 9 of the Statute have not been repealed.

As gleaned from ss1 to 4 thereof, the Statute – generally regarded as the maiden English patent legislation – was enacted to subject monopolies and letters of patents granted by the British Crown to the common law of England.<sup>21</sup> However, by virtue of s6, the Statute excludes patents granted in respect of novel inventions. Section 9, which

<sup>15</sup> Cap C28, Laws of the Federation of Nigeria, 2004.

<sup>16</sup> Cap C20, Laws of the Federation of Nigeria, 2004.

<sup>17</sup> Nigerian Communication Act, 2003 and Nigerian Communication Act-Competition Practice Regulation, 2007; Investments and Securities Act, 2007.

<sup>18</sup> Chapter 3 21 Ja 1.

<sup>19</sup> B Sodipo 'FDI and Nigeria's IP landscape' (2017) available at <http://www.qmipri.qmul.ac.uk/docs/199218.pdf>, accessed 11 July 2018.

<sup>20</sup> The Interpretation Act Cap I23, Laws of the Federation of Nigeria, 2004, s32(1).

<sup>21</sup> C Dent 'Generally inconvenient': the 1624 *Statute of Monopolies* as political compromise' (2009) 33 *MULR* 415-453.

excludes ‘corporations, companies, or fellowships of any art, [...] or societies of merchants [...] erected for the maintenance, enlargement, or ordering of any trade or merchandise [...]’ from the Statute’s ambit, may be interpreted to mean exclusion of CMOs from application of the Statute. Flowing from the discussion in chapter 2 of this thesis, CMOs can be regarded as ‘corporations, companies, or fellowships of any art [...]’ for purpose of the Statute in the sense that they deal with works protected by copyright law (‘any art’) on behalf of copyright owners. However, in view of the enactment of the Nigerian Competition Act, it is submitted that ss1 to 4, 6, 7, and 9 of the Statute cannot be applied to competition related issues in Nigeria. This accords with the attitude of the Nigerian courts, which is to refrain from relying on English statutes in situations where local statutes have been enacted.<sup>22</sup>

That being said, it is important to note that the application of the Nigerian Competition Act applies in principle to CMOs in Nigeria.<sup>23</sup> However, its application in practice to CMOs will depend on whether the copyright sector-specific regulatory framework does not empower the NCC to address the competition concerns raised by CMO in the copyright management and licensing market in Nigeria, an issue this thesis aims to resolve.

The current regulatory framework for CMOs in Nigeria have not been the focus of much academic research. Although the leading literature in this regard considers it as a ‘comprehensive legal framework’,<sup>24</sup> it does not address the question whether the regulatory framework takes care of the CMOs’ competition law concerns discussed in this thesis. This said, the recent work by Olubiyi and Adam seems relevant in this context.<sup>25</sup> While examining the adequacy of the regulatory framework for CMOs in Nigeria, the authors sought to ‘inquire into whether the regulatory regime in Nigeria is adequate for the purpose of ensuring efficiency in collective administration of copyright or whether it goes overboard by curtailing the freedom of [CMOs] beyond what is necessary’.<sup>26</sup> In so doing, the authors recognised, among other issues, CMOs’ monopolistic nature and the impact on copyright owners and users as justification for regulating CMOs in Nigeria. However, they did not address the issue from the

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<sup>22</sup> *Chigbu v Tonimas* (2006) 9 NWLR 984 189.

<sup>23</sup> Federal Competition and Consumer Protection Act, 2018 (Nigerian Competition Act), s2.

<sup>24</sup> O Ola *Copyright Collective Administration in Nigeria: Lessons for Africa* (2013) 95.

<sup>25</sup> IA Olubiyi and KI Adams ‘An examination of the adequacy of the regulation of collecting societies in Nigeria (2017) 5 *SAIPLJ* 87-112.

<sup>26</sup> *Ibid* 88.

perspective of the copyright and competition law interface. Moreover, they left unanswered the specific question whether there is need for competition law in regulating CMOs in Nigeria. Indeed, the work did not identify major CMOs' competition law concerns in Nigeria.

In South Africa, the following CMOs exist: the new South African Music Performance Rights Association (SAMPRA – a merger of the old SAMPRA and Performers' Organisation of South Africa Trust [POSA]); Southern African Music Rights Organisation (SAMRO); Dramatic, Artistic and Literary Rights Organisation (DALRO); Composers, Authors and Publishers Association (CAPASSO); Independent Music Performance Rights Association (IMPRA); Recording industry of South Africa's Audio-visual (RAV); Christian Copyright Licensing International (CCLI); and Motion Picture Licensing Company (MPLC).

Here, the South African Copyright Act (SA Copyright Act),<sup>27</sup> Performers' Protection Act,<sup>28</sup> Collecting Societies Regulations, 2006 (CS Regulations) and the Companies Act<sup>29</sup> form the regulatory framework for CMOs. In principle, CMOs in South Africa also fall within the purview of the SA Competition Act.<sup>30</sup> However, the Minister may exempt them from operation of the SA Competition Act where necessary applications are made.<sup>31</sup> CMOs in South Africa are currently regulated in practice by the Companies and Intellectual Property Commission (CIPC) without recourse to the SA Competition Act. The extent to which the SA Copyright Act, Performers Protection Act, CS Regulations and Companies Act empower the CIPC to address CMOs' competition law concerns in South Africa has not been specifically examined by existing literature.<sup>32</sup>

## 1.5 Research Structure

This is a thesis of six chapters. This general introduction is the first. The second chapter lays the foundation of the thesis by discussing the general issues relating to collective management with particular focus on its justification; the impact of digitisation; basis

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<sup>27</sup> No 98 of 1978

<sup>28</sup> No 11 of 1968

<sup>29</sup> No. 71 of 2008

<sup>30</sup> Competition Act, No 89 of 1998 (SA Competition Act).

<sup>31</sup> SA Competition Act, s10(4).

<sup>32</sup> JJ Baloyi and T Pistorius 'Collective Management in Africa' in D Gervais (ed.) 3rd ed. *Collective Management of Copyright and Related Rights* (2016) 369-424; Department of Trade and Industry *Copyright Review Commission Report* (2011).

for regulating CMOs and specific regulatory and competition concerns. The chapter also briefly examines the types of collective management, and the types of regulatory frameworks, among others.

Chapters three and four are country specific. Against the backdrop of the research questions, stated earlier in 1.2 above, they highlight and discuss the history of collective management, the existing CMOs, and the regulation of CMOs, among other issues in Nigeria and South Africa respectively.

The regulation of CMOs by competition law is examined in chapter five. The chapter will begin by discussing in some detail the copyright and competition law interface. This is to form the foundation for analysing the link between copyright regulatory frameworks and competition law in the regulation of CMOs in the course of the chapter. The research questions highlighted in 1.2 above will be specifically answered in chapter six, which will also contain the recommendation and general conclusion of the thesis.

## CHAPTER TWO: COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

### 2.1 Introduction

Collective management of copyright and related rights (collective management) is a core ‘element of [the] economic activity within the copyright-based industries’.<sup>1</sup> This is not to say there are no other means by which the economic activities within the industry would thrive.<sup>2</sup> However, as will become apparent in the course of this chapter, collective management appears as an indispensable mechanism for this purpose.<sup>3</sup> To recapitulate, the objective of this thesis is to examine the regulation of CMOs in Nigeria and South Africa to determine if the regulatory frameworks in both countries empower the relevant copyright regulatory bodies to address the competition concerns raised by CMOs’ conducts in the copyright management and licensing markets. The research will also determine if there is need to apply competition law to regulating CMOs in both countries.

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<sup>1</sup> KN Monyatsi *Survey on the Status of Collective Management Organizations in ARIPO Member States* (2015) 16. Note that there are several World Intellectual Property Organisation (WIPO) studies which identified the existence of the copyright-based industries and their contribution to national economies. Generally, see WIPO *WIPO Studies on the Economic Contribution of the Copyright Industries: An Overview* (2014). For South Africa, see See A Pouris and R Inglesi-Lots *The Economic Contribution of Copyright-based Industries in South Africa* (WIPO Report, 2011). No such study on Nigeria yet, but see NCC ‘Medium term corporate plan and strategy (2012-2014)’ available at [http://kyg.nigeriagovernance.org/Attachments/Organization/Mtss/158\\_MTSS\\_Nigerian%20Copyright%20Commission%20\(NCC\).pdf](http://kyg.nigeriagovernance.org/Attachments/Organization/Mtss/158_MTSS_Nigerian%20Copyright%20Commission%20(NCC).pdf), accessed on 3 March 2017

<sup>2</sup> A Katz ‘The potential demise of another natural monopoly: Rethinking the collective administration of performing rights’ (2005) 1(3) *JCLE* 541-593 (The potential demise 1); A Katz ‘The potential demise of another natural monopoly: new technologies and the administration of performing rights’ (2006) 2(2) *JCLE* 245-284 (The potential demise 2).

<sup>3</sup> R Towse ‘Managing copyrights in the cultural industries’ available at [http://neumann.hec.ca/aimac2005/PDF\\_Text/Towse\\_Ruth.pdf](http://neumann.hec.ca/aimac2005/PDF_Text/Towse_Ruth.pdf), accessed on 6 March 2017; R Towse and C Handke ‘Regulating copyright collecting societies: current policy in Europe’ (2007) available at <http://www.serci.org/2007/towsehandke.pdf>, accessed on 6 March 2017; C Handke ‘The economics of collective copyright management’ (2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2256178](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256178), accessed on 6 March 2017; MM Frabboni ‘The Changing Market for Music Licensing: A Redefinition of Collective Interests and Competitive Dynamics’ in A Flanagan and ML Montagnani (eds.) *Intellectual Property Law: Economics and Social Justice Perspectives* (2010) 144-162; J Schovsbo ‘The necessity to collectivize copyright – and the dangers thereof’ (2010) available at [http://static-curis.ku.dk/portal/files/20596531/The\\_Necessity\\_to\\_collectivize\\_copyright\\_SSRN.pdf](http://static-curis.ku.dk/portal/files/20596531/The_Necessity_to_collectivize_copyright_SSRN.pdf), accessed on 6 March 2017; D Gervais and A Maurushat ‘Fragmented copyright, fragmented management: proposals to defrag copyright management’ (2003) 2(1) *CJLT* 15-34.

This chapter focuses on collective management generally. Among others, it discusses the role of CMOs. The goal here is to identify the legal, economic, and socio-cultural functions that make CMOs indispensable within the copyright licensing framework. The chapter also examines the classification of collective management broadly before narrowing it down to the categorisation of CMOs in terms of the mode of rights acquisition. Further, the chapter discusses the justification for collective management, the impact of digitisation on collective management and the competition issues in collective management. The aim is to address major concerns raised by competition scholars about the continued existence of CMOs, and the preservation of their monopoly, within the collective management and licensing market in the digital era. The discussion will be better appreciated within the broad context of the interface between copyright law and competition law as it affects collective management. The interface between copyright and competition law is discussed in chapter five. For now, it should be noted that although adopting different approaches, both copyright and competition law can enhance creativity and social welfare. For this purpose, copyright law confers exclusive rights (often referred to as monopoly) on creators of copyright works over their creation, subject to certain exceptions that allow equitable access to the works by the public. On the other hand, competition law focuses on controlling the behaviour of dominant firms or monopolies within a defined market.

The chapter ends by highlighting the rationale for regulating collective management, different regulatory approaches, regulatory issues and the discourse about the complementarity of copyright and competition law, or the substitution of one for the other, in regulating collective management. Overall, the discussion in this chapter is aimed at setting the tone for further engagement with the research questions of the thesis in chapters three, four and five below.

## **2.2 The roles of CMOs**

The meaning of collective management has been explained in a plethora of literature, which underscores the fact that CMOs are core to the operation of collective

management systems.<sup>4</sup> Statutory and other definitions of CMOs exist.<sup>5</sup> However, the meaning of collective management has been aptly presented by Ficsor, as follows:

‘In the framework of [collective management], [copyright owners] authorise [CMOs] to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among [copyright owners].’<sup>6</sup>

Ficsor further asserts that although the foregoing may be regarded as a basic definition of collective management, ‘the collective nature of the management may, and frequently does also involve some other features corresponding to certain functions going beyond the collective exercise of rights in the strict sense’.<sup>7</sup>

Thus, the core objectives of collective management include monitoring of uses of copyright works by CMOs on behalf of copyright owners; negotiation with, and granting of copyright licenses to prospective users; collection of such royalties from copyright users; and distribution of the royalties to copyright owners on whose behalf the royalties were collected. In deserving cases, it also involves the institution of infringement claims by CMOs on copyright owners’ behalf.<sup>8</sup> These objectives are regarded as the legal and economic functions of CMOs.

As gleaned from Ficsor’s statement above, the evolving nature of collective management has brought about other roles for CMOs outside their core functions. These roles include their socio-cultural functions performed on the basis of solidarity,<sup>9</sup>

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<sup>4</sup> M Ficsor *Collective Management of Copyright and Related Rights* (2002); U Uchtenhagen *Copyright Collective Management in Music* (2011); DJ Gervais ‘The landscape of collective management schemes’ (2011) 34(4) *CJLA* 423-449; T Koskinen-Olsson and N Lowe *Educational Material on Collective Management of Copyright and Related Rights (Module 1)* (2012); DJ Gervais ‘Collective management of copyright and neighbouring rights in Canada: An international perspective’ (2002) 1(2) *CJLT* 21-50; O Ola *Copyright Collective Administration in Nigeria: Lessons for Africa* (2013) 8.

<sup>5</sup> SA Copyright Act, s1; Performers Protection Act (SA), s1; Regulations on the Establishment of Collecting Society in the Music Industry, GN 517 in GG 28894 of 1 June 2006 (SA), Regulation 1; Intellectual Property Law Amendment Act 28 of 2013, ss3 and 15; Department of Trade and Investment (DTI) *Copyright Review Commission Report* (2011) 39; Nigerian Copyright Act, s39 (8).

<sup>6</sup> Ficsor op cit note 4 at 17.

<sup>7</sup> Ibid.

<sup>8</sup> A Adewopo ‘Developments in Collective Administration of Copyright, Licensing and Tariff Setting under Nigerian Copyright Law and Regulation’ in DCJ Dakas et al (eds.) *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (2016) 677-700.

<sup>9</sup> S Nerrisson ‘Social functions of collective management societies (CMS) provisory conclusions’ (2007) available at [http://www.ip.mpg.de/shared/data/pdf/3\\_nerrisson\\_-\\_social\\_functions.pdf](http://www.ip.mpg.de/shared/data/pdf/3_nerrisson_-_social_functions.pdf), accessed on 6 March 2017; J Street, et al ‘Collective management organisations, creativity and cultural diversity’ (2015) *CREATe Working Paper* 2015/03.



manifested in the respective mandates from copyright owners to a particular CMO.<sup>10</sup> The solidarity, which is also expressed by reciprocal agreements among foreign sister CMOs, has several effects. It ensures that copyright owners are vested with requisite power in the market place. This enables them to collectively bargain with huge corporate users and government agencies. It also extends to the corridors of government. Through CMOs, copyright owners are able to influence government policies and legislation geared towards adequate copyright protection.<sup>11</sup> Also, copyright owners are able to team up with relevant government agencies to curb piracy. Other socio-cultural functions of CMOs include events aimed at promoting and developing cultural creativity; creation of support funds for indigent copyright owners; establishment of annuity funds; amongst others.<sup>12</sup>

To perform these functions, CMOs deduct a certain percentage from the amount of royalty collected. The percentage is determined by members' mandate or legislation. This is important because CMOs are traditionally allowed to deduct only administrative costs from the royalties collected before distribution among its members. Thus, any deduction for any other purpose or activities must be sanctioned by its members or by relevant legislation. In practice, deductions for socio-cultural purposes are not more than 10% of collected royalties.<sup>13</sup> Under the CISAC model reciprocal agreements, member CMOs are allowed to stipulate the right of contracting national CMOs to deduct 10% of royalties collected on behalf of the foreign CMO to undertake socio-cultural activities locally.<sup>14</sup>

In view of their capacity to afford copyright owners a strong bargaining platform with large copyright users and government and their socio-cultural functions highlighted above, CMOs may be mistaken for trade associations representing

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<sup>10</sup> M Kretschmer 'Access and reward in the information society: regulating the collective management of copyright' (2007) available at <http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>, accessed on 7 March 2017.

<sup>11</sup> B Andersen, et al 'Copyrights, Competition and Development: The case of the Music Industry' (UNCTAD Discussion Paper No.145, 2000), 21.

<sup>12</sup> The Southern African Music Rights Society (SAMRO) undertakes anti-piracy activities in form of public enlightenment programmes. It also has a funeral benefit scheme and an annuity fund: SAMRO 'Integrated Report 2015' available at [http://www.samro.org.za/sites/default/files/Samro\\_IR\\_9175\\_FULL%20IR\\_4Nov\\_WEB\\_FINAL%20REPORT.pdf](http://www.samro.org.za/sites/default/files/Samro_IR_9175_FULL%20IR_4Nov_WEB_FINAL%20REPORT.pdf), accessed on 6 March 2017. Also, the Copyright Collecting Society of Nigeria (COSON) is involved in anti-piracy efforts in Nigeria: OA Olatunji, et al 'Collective management of rights in musical works and sound recordings: a critique of the Copyright Society of Nigeria' (2017) *IIC* 1-26.

<sup>13</sup> Ficsor op cit note 4 at 151.

<sup>14</sup> Ibid.

copyright owners.<sup>15</sup> The Performing Musicians Association of Nigeria and the Recording Industry of South Africa are examples of copyright owners' trade associations in Nigeria and South Africa respectively. However, CMOs vary from these trade associations because of the CMOs' core functions identified above and also because unlike CMOs, copyright owners do not assign or license their copyright to their trade associations.<sup>16</sup> CMOs may also be regarded as trustees. This is because copyright owners usually vest the CMOs with their rights the same way an owner of property vests a trustee with rights over the property under a trust.<sup>17</sup>

Even so, some forms of collective management exist in which CMOs do not perform all the principal objectives outlined above. Such forms are referred to as partial collective management.<sup>18</sup> For instance, in the management of dramatic works, owners of copyright mandate CMOs to undertake collective bargaining and establishment of framework agreements with owners of theatres, monitor uses of their works, collect royalties and transfer it to the copyright owners. Such copyright owners retain the right to complete individual licensing agreements with the theatre owners on the basis of the framework agreements collectively bargained by the CMOs.<sup>19</sup> Also, the collective element in a collective management may be reduced to a mere agency-type wherein copyright owners authorise a CMO to act as rights clearing house. Here, the CMO is only mandated to collect for and transfer royalties to the copyright owners. The copyright owners individually negotiate the royalties and licensing conditions with users of copyright works. Such system thrives where the copyright owners are mainly corporate rights owners like producers and publishers.<sup>20</sup>

There is another system where collective management relates only to the management of equitable remuneration rights. This is usually in cases where copyright has been reduced by statute to remuneration rights.<sup>21</sup> They include instances of statutory or compulsory licences in form of resale rights, and copyright levies, among

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<sup>15</sup> IA Olubiyi and KI Adams 'An examination of the adequacy of the regulation of collecting societies in Nigeria (2017) 5 *SAIPLJ* 87-112, 93.

<sup>16</sup> *CARFAC v National Gallery of Canada* [2014] 2 SCR 197-211 at at 208-209 paras 22, 23, and 24.

<sup>17</sup> CB Graber 'Collective rights management, competition policy and cultural diversity: EU lawmaking at a crossroads' (2012) 4(1) *The WIPOJ* 35-49; T Koskinen-Olsson and N Lowe *Educational Materials on Collective Management of Copyright and Related Rights (Module 2)* (2012) 22.

<sup>18</sup> Ficsor op cit note 4 at 18.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid at 22.

<sup>21</sup> Ibid.

others. In such situations, the relevant statute usually prescribe remuneration for copyright owners through CMOs.

### 2.3 Classification of collective management

Gervais has identified several ways of classifying collective management.<sup>22</sup> According to the author, collective management could be classified according to the legal basis upon which CMOs operate.<sup>23</sup> In this sense, CMOs could operate as general-purpose organisations or for specific class of rights as provided for by the enabling law. Collective management may also be classified according to the field of activity.<sup>24</sup> Here, CMOs' field of operation includes music, print and publishing, audio-visual, visual arts, amongst other fields.<sup>25</sup> Further, collective management could be classified according to the ways CMOs acquire rights; how they are structured, managed or their licensing practice; among others.<sup>26</sup>

This thesis first examines the classification according to the field of operation of CMOs to show the scope of operation of CMOs in Nigeria and South Africa. It then narrows down the discussion to the classification according to the manner of rights acquisition by CMOs because it will aid in the determination of the extent to which competition law can be applied within the context of collective management.

Generally, and as shown in chapters three and four respectively, CMOs in Nigeria and South Africa are established under the following broad fields: music, print/publishing and visual arts, and audio-visual fields. A discussion of the economic contribution of the subsectors of the creative industry to the global economy in general, and the economy of South Africa and Nigeria in particular is, beyond the scope of the present discussion.<sup>27</sup> It suffices to state that collective management appears more

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<sup>22</sup> Gervais 'Collective management of copyright in Canada' op cit note 4.

<sup>23</sup> Ibid

<sup>24</sup> Ibid.

<sup>25</sup> Generally, see T Koskinen-Olsson and N Lowe *Educational Materials on Collective Management of Copyright and Related Rights (Modules 2-6)* (2012)

<sup>26</sup> Ibid.

<sup>27</sup> See also, EY *Cultural Times – The First Global Map of Cultural and Creative Industries* (2015) available at <http://www.cisac.org/Cisac-University/Library/Studies-Guides/Cultural-Times-The-First-Global-Map-of-Cultural-and-Creative-Industries>, accessed on 7 March 2017; AS Rutschman 'Weapons of mass construction: the role of intellectual property in Nigeria's film and music industries' (2015) 29 *EILR* 673-704; NFVF *South African Film Industry Economic Baseline Study Report* (2013) 6 available at <http://nfvf.co.za/home/22/files/Baseline%20study.pdf>, accessed on 7 March 2017; E Enejeta 'Nigeria's \$7.2bn film industry gains traction in Europe' *Financial Watch* 3 June 2016 available at <http://www.financialwatchngr.com/2016/06/03/nigerias-7-2bn-film-industry-gains->

widespread in the music industry. A recent African Regional Intellectual Property Organisation (ARIPO) survey on CMOs in member states reveals that CMOs in the field of music collected the highest amount of royalties within the period covered by the survey.<sup>28</sup> The same is true of royalty collection in Nigeria and South Africa.<sup>29</sup>

There are several CMOs operating globally in the field of music and they are linked by reciprocal agreements with each other. CMOs operating in the field of music possess varying repertoire composed of musical works and sound recordings (musical copyright). Some focus on public performance or mechanical rights separately,<sup>30</sup> while others focus on both rights jointly.<sup>31</sup> Such management may be for authors, composers and publishers on the one hand, and performers and/or producers on the other hand. Further, there are CMOs that administer copyright in the music industry for all copyright owners in the industry.<sup>32</sup> It is also possible to find a general purpose CMO managing musical copyright with other copyright within the country.<sup>33</sup> As will be shown in chapters three and four respectively, there are two CMOs in the Nigerian music industry, while that of South Africa has five.

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*traction-europe/*, accessed on 7 March 2017; PASA 'Annual Book Publishing Industry Survey 2016' (January 2018) 4 available at <http://www.publishsa.co.za/file/1519203677awr-2016publishingindustrysurvey.pdf>, accessed 4 April 2018; M Shosanya 'Printing Industry is Dying, Cry Chartered Printers, Others' *Daily Trust Newspaper* 12 April 2015 available at <http://www.dailytrust.com.ng/sunday/index.php/business/20268-printing-industry-is-dying-cry-chartered-printers-others>, accessed 7 March 2017; C Okeke 'Why Nigerians hardly appreciate works of arts' *Leadership Newspaper* 2 March 2014 available at <http://leadership.ng/style/350814/nigerians-hardly-appreciate-works-art>, accessed on 7 March 2017

<sup>28</sup> Monyatsi op cit note 1.

<sup>29</sup> T Okoroji 'COSON extra-ordinary general meeting December 15, 2016, chairman address' available at <http://www.cosonng.com/coson-extra-ordinary-general-meeting-december-15-2016-chairmans-address/>, accessed on 6 March 2017; SAMRO 'Integrated Report 2016' 56 available at [http://www.samro.org.za/sites/default/files/SAMRO\\_IR\\_10070\\_1Nov\\_V4e\\_LN\\_FinalWebDocument%20%281%29.pdf](http://www.samro.org.za/sites/default/files/SAMRO_IR_10070_1Nov_V4e_LN_FinalWebDocument%20%281%29.pdf), accessed on 14 September 2017; SAMRO 'Integrated Report 2015' 27 available at [http://www.samro.org.za/sites/default/files/Samro\\_IR\\_9175\\_FULL%20IR\\_4Nov\\_WEB\\_FINAL%20REPORT.pdf](http://www.samro.org.za/sites/default/files/Samro_IR_9175_FULL%20IR_4Nov_WEB_FINAL%20REPORT.pdf), accessed on 6 March 2017.

<sup>30</sup> The American Society of Authors, Composers and Publishers (ASCAP) and Broadcast Music Incorporated (BMI) are examples of collecting societies focusing on performing rights. Musical Copyright Protection Society (MCPS) of the United Kingdom (UK) and the Society of the Reproduction Rights of Authors, Composers and Editors in Canada (SODRAC) are mechanical rights collecting societies in UK and Canada respectively.

<sup>31</sup> PRS for Music in the UK (an alliance of Performing Rights Society and MCPS) administers performing and mechanical rights jointly.

<sup>32</sup> For instance, COSON and MCSN.

<sup>33</sup> The Copyright Society of Malawi (COSOMA) is an example of such collecting society: Copyright Act, 1989 (Malawi), ss41 and 42.

The nature of the printing and publishing market has made it inevitable for collective management to thrive.<sup>34</sup> One of the major features of this market is widespread copying of literary works. CMOs in this field are generally known as Reprography Rights Organisations (RROs).<sup>35</sup> Also, the growth in museums, arts galleries and digitisation of visual arts for multimedia uses led to the emergence of collective management in the visual arts field. CMOs manage both the primary rights (reproduction rights, broadcasting rights and rights of communication to the public) and resale rights (where available) for visual artists.<sup>36</sup> Although collective management in the fields of printing/publishing and visual arts developed separately, it is not unusual to find an RRO administering the rights in both works jointly. This is the case in South Africa and Nigeria, as will become apparent in chapters three and four respectively.

Collective management in the audio-visual industry extends to exclusive rights such as performing rights. It may be limited to remuneration rights in the audio-visual field, depending on the particular national copyright law. Remuneration rights include private copying remuneration, rental remuneration or remuneration for broadcast retransmission via cable. In some countries, these rights are subject to mandatory collective management.<sup>37</sup> Different CMOs operate within the audio-visual field. There are those mainly for creators, those for performers, those for producers, and those representing all copyright owners or a mix of them. General-purpose CMOs also manage rights in audio-visual works along with rights in other works.<sup>38</sup> As discussed in the third and fourth chapters respectively, there is one audio-visual CMO in Nigeria, while South Africa has three.

Regardless of the field of operation of a CMO, the application of competition law to regulate its conduct will depend largely on the manner of rights acquisition by the CMO. Here, CMOs can be categorised as organisations that manage the exclusive rights (reprographic, performance, or mechanical, rights among others) on the basis of the mandate voluntarily given by copyright owners; and CMOs operating on the basis

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<sup>34</sup> See T Koskinen-Olsson and N Lowe *Educational Materials on Collective Management of Copyright and Related Rights (Module 4)* (2012).

<sup>35</sup> Ibid.

<sup>36</sup> T Koskinen-Olsson and N Lowe *Educational Materials on Collective Management of Copyright and Related Rights (Module 5)* (2012).

<sup>37</sup> T Koskinen-Olsson and N Lowe *Education Material on Collective Management of Copyright and Related Rights (Module 3)* (2012) 13. For a discussion of mandatory collective management, see SV Lewinski 'Mandatory collective administration of exclusive rights – a case study on its compatibility with international and EC copyright law' (2004) 1 *UNESCO e.Copyright Bulletin* 1-14

<sup>38</sup> Ibid.

of a statutory power conferred on them to collect and distribute royalties on behalf of copyright owners in situations where copyright owners' interest in a work has been limited to mere statutory rights as pointed out above. As shown in chapters three and four below, CMOs in Nigeria and South Africa can be classified as exclusive rights CMOs.

In practice, while CMOs falling within the first class (exclusive rights CMOs) are usually subject to the full weight of competition law oversight – especially where the copyright sector-specific regulation does not address the competition concerns, the CMOs in the second class (remuneration rights CMOs) are usually regulated under the enabling statute. The rationale for this approach is not far-fetched. Exclusive rights CMOs readily fall within the notion of natural (or *de facto*) monopoly, while remuneration rights CMOs may be regarded as *de jure* monopolies. The concepts of natural, *de facto* and *de jure* monopoly have been defined in chapter one above.

It suffices now to note that collective management in the USA offers an established example of the foregoing discussion. Here, performing rights CMOs – such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI) – are subject to consent decrees devised under US competition laws and administered by a royalty rate court. The rate court has powers to set licensing fees where the CMOs and users fail to reach an agreement. On the other hand, other CMOs administering remuneration rights are subject to the regulatory powers of the Copyright Royalty Board (CRB) as defined by the US Digital Performance Right in Sound Recordings Act (DPRA) of 1995, the US Digital Millennium Copyright Act (DMCA),<sup>39</sup> and the US Musical Works Modernisation Act, 2018.

## **2.4 Collective management and competition**

The point was made in chapter one above that CMOs are generally natural monopolies that should be regulated by a regulatory framework that addresses their competition related concerns. However, scholars have raised serious questions about the validity of the natural monopoly argument as basis for the continuous existence of CMOs and the need for their regulation in modern times especially given the rise of other rights

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<sup>39</sup> JM McGivern 'A performing rights organization perspective: the challenges of enforcement in the digital environment' (2011) 34(4) *CJLA* 631-643; A Dietz 'Legal regulation of collective management in Western and Eastern Europe' (2002) 49 *JCSU* 897-916.

aggregation platforms made possible by digital technology. Simply put, the question is whether CMOs should still be allowed to exist in modern times. To resolve this question, it is important to examine the justification for the emergence of CMOs to determine if it still holds in the digital era. The development of digital technology and impacts on collective management will also be examined to determine if digitisation has eroded the CMO natural monopoly argument. Following this, specific CMO competition concerns will be briefly highlighted to put further discussion in the thesis in proper perspective.

#### 2.4.1 Justification for collective management

Based on the exclusivity conferred on them by copyright law, copyright owners may choose to prevent third parties from using their works. They may also choose to grant third parties access to the works either freely or on agreed terms and conditions. Copyright owners may choose to exercise their exclusive rights personally or authorise another person to exercise the right on their behalf and for their benefit. This flows from the individualistic foundation of copyright.<sup>40</sup> In this regard, copyright exclusivity is seen as an example of property rights,<sup>41</sup> based on property rules: that is, ‘a legal entitlement which cannot be removed without prior bargaining’ with the copyright owners.<sup>42</sup>

Copyright law is not only about the protection of copyright owners. It is also about ensuring the protection of the public interest in the promotion of arts, culture and science.<sup>43</sup> These ends of copyright run through the theories that have been advanced for its justification. From a review of relevant literature, Fisher summarised four main theories in this regard.<sup>44</sup> Although focusing on IP generally, Fisher’s summary is

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<sup>40</sup> M Ficsor ‘The international copyright treaties and collective management – key issues (background paper)’ (2009) available at [http://www.zis.gov.rs/upload/documents/pdf\\_en/pdf/seminari/15sep2009\\_copyright\\_protection.pdf](http://www.zis.gov.rs/upload/documents/pdf_en/pdf/seminari/15sep2009_copyright_protection.pdf), accessed on 6 March 2017; A Lorrain ‘Governing collective rights management of copyright protected resources, or how building upon copyright collectivisation’ (2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2398901](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398901), accessed on 6 March 2017.

<sup>41</sup> Whether or not copyright is actually property is debatable. The debate usually arises within the context of copyright and human right discourse. This is highlighted briefly under the discussion of mandatory collective management below and in chapter three.

<sup>42</sup> A Kur and J Schovsbo ‘Expropriation or fair game for all? The gradual dismantling of the IP exclusivity paradigm’ (2009) available at <http://ssrn.com/abstract=1508330>, accessed on 6 March 2017.

<sup>43</sup> C Armstrong et al Access to Knowledge in Africa: The Role of Copyright (2010) 3-5.

<sup>44</sup> W Fisher ‘Theories of intellectual Property’ available at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>, accessed 28 June 2018.

obviously important in this discussion because some of the key literature he reviewed considered the justification of copyright law. Moreover, copyright law is a *genre* of IP law. According to Fisher, the first theory adopts the utilitarian approach, which ‘requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of [...] works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations’ (utilitarian theory). The second theory employs the ‘propositions that a person who [labours] upon resources that are either unowned or “held in common” has a natural property right to the fruits of his or her efforts – and that the state has a duty to respect and enforce that natural right’ (natural rights theory). The third theory hinges on the belief that ‘private property rights are crucial to the satisfaction of some fundamental human needs; [and] policymakers should thus strive to create and allocate entitlements to resources in the fashion that best enables people to fulfil those needs’ (economic theory). Finally, the fourth theory is ‘rooted in the proposition that [copyright] can and should be shaped so as to help foster the achievement of a just and attractive culture’. Fisher describes this as the ‘social planning theory’. According to him, this theory is similar to the utilitarian theory ‘in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conceptions of “social welfare”’,<sup>45</sup>

To achieve the goals highlighted above, copyright law seeks to strike an equitable balance between the copyright owners’ and public interests by limiting the exclusivity vested on copyright owners through the instrumentality of exceptions and limitations such as fair dealing (and fair use) exceptions, among others. Discussion of these exceptions and limitations is beyond the scope of this thesis.<sup>46</sup> It suffices to note, however, that copyright exceptions and limitations are limited in their application. There are uses of copyright works over which copyright owners still exercise their exclusivity, which are not covered by copyright exceptions and limitations. In these areas, users of copyright works are bound to seek authorisation from copyright owners before exploiting their works. Even in areas where copyright exceptions and limitations are applicable, users may also wish to seek authorisations because of the vagueness of

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<sup>45</sup> Ibid.

<sup>46</sup> T Schonwetter ‘Safeguarding a fair copyright balance – contemporary challenges in a changing world: lessons to be learnt from a developing country’s perspective’ (unpublished PhD Thesis, University of Cape Town, 2009).



some of the exceptions and limitations. Further, there are also uses for which authorisation from copyright owners is not required, but for which the user must pay certain remuneration.

Copyright law only gives rights to copyright owners to enable them derive reward for their labour and investment. But the responsibility to transform these rights to actual and material rewards rests on the copyright owners.<sup>47</sup> This can be achieved through effective management, monitoring and enforcement of the rights. In other words, the copyright owners' rewards are best determined through a 'complex interaction of law, market forces and institutional arrangements'.<sup>48</sup>

Every stage of societal development brings about difficulty in individual monitoring of uses and enforcement of copyright for copyright owners. This difficulty flows from the nature of copyright works and the copyright market,<sup>49</sup> which is significantly impacted by digitisation. Copyright works are capable of multiple uses without dissipation in their value. They are capable of being used at the same time and at different places by different users. For instance, it is possible for a single sound recording to be performed in multiple restaurants, bars, hotels, nightclubs, shopping malls, buses, airplanes, and trains; or aired on television and radio to millions of people globally. It is also possible for the sound recording to be streamed live on, or downloaded from, Internet platforms simultaneously across the globe. The same situation afflicts literary works and other copyright works. In such situations, widespread unauthorised use of copyright works is inevitable. This is so because the copyright owners will not be able to prevent or authorise all uses of their works. They cannot be in all places at the same time. The individual copyright owners will incur significant cost in trying to negotiate copyright license with all users, obtain royalties, and monitor the uses of their works. Consequently, they will not be able to gain reward or compensation for their creativity, labour and investment in producing the copyright work.

The emergence of collective management is a reaction to the above situation. Historically, collective management was a product of the creative thinking – a form of

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<sup>47</sup>Towse 'Managing copyright in the cultural industries' op cit note 3.

<sup>48</sup> Ibid.

<sup>49</sup> Copyright market has been described as complex and the demand for copyright works described as 'notoriously volatile and unpredictable': Handke op cit note 3.

revolution – of copyright owners as a solution to the difficulty plaguing individual monitoring and enforcement of copyright.<sup>50</sup> The literature is replete with the story of the emergence of collective management.<sup>51</sup> It suffices to note that collective management started well over two hundred years ago in France.<sup>52</sup> It has today spread across the globe and is contributing largely to the gross domestic products of nations.<sup>53</sup>

The spread of collective management is not mainly because it serves the interest of copyright owners alone. It is also useful in solving the problems of access to copyright works for users. For instance, a user may be interested in using a sound recording. The sound recording would usually contain various rights such as public performance rights, mechanical (reproduction) rights, and broadcasting rights. These rights may inhere in different persons such as the composer of the music, the author of the lyrics, the publisher of the music, the performer and producer of the sound recording. It is also possible for these rights to inhere in a single individual. But getting hold of the individual is another matter entirely. The situation is more complicated where the user is interested in multiple sound recordings. This is so in cases of mass users like broadcasting firms. The foregoing is what scholars have regarded as the problem of rights fragmentation in copyright law.<sup>54</sup> No doubt, it will be difficult and extremely costly for the user to obtain a license in such circumstance. Thus, through collective management the gap between the copyright owners and users is bridged. Collective management makes it easy for users to secure licenses from copyright owners while at the same time enabling copyright owners to obtain reward for their efforts.

Collective management operates through CMOs, which operate within the national boundaries. To bridge the gap between copyright owners and users, CMOs are expected to obtain mandates from copyright owners. The copyright owners include national copyright owners and foreign copyright owners. From national copyright owners, the CMOs in a particular country obtain mandates through assignments, exclusive licenses or non-exclusive licenses as the case may be. National CMOs obtain

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<sup>50</sup> G Karnell 'Collective administration of authors' rights' (1986) 2 *CMRWIPO* 45-66.

<sup>51</sup> Ficsor op cit note 4; D Gervais 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D Gervais (ed.) *Collective Management of Copyright and Related Rights* (2010) 1-28.

<sup>52</sup> Ibid.

<sup>53</sup> Monyatsi op cit note 1.

<sup>54</sup> Gervais and Maurushat op cit note 3.

authorisation through reciprocal agreements with sister foreign CMOs, on behalf of foreign copyright owners. Reciprocal agreements are possible through the network provided by international organisations of national CMOs.<sup>55</sup> Thus, within a country, a particular CMO would be able to possess a world repertoire of copyright works. In practice, CMOs' repertoires usually include works over which the CMOs do not have authorisation. Such works includes orphan works, works of deceased copyright owners that are already in the public domain.<sup>56</sup>

Armed with the world repertoire, CMOs solve the problem of fragmentation by bundling the various rights of copyright owners within their repertoire and granting access to users through the issuance of blanket licenses.<sup>57</sup> Blanket licenses 'issued to users have been very useful instruments that allow access to the totality of a CMO's repertoire. Users obtaining blanket licenses are not only permitted to use any work, but they are entitled to do so as many times as they want' within the timeframe for which the license was issued.<sup>58</sup> The blanket license also makes it easy for the management of the right of every copyright owner within the repertoire of the CMO. CMOs also issue licenses – known as transactional, per work or per programme license – covering only particular work and for specific use.<sup>59</sup> However, blanket licenses are more widespread, even in Nigeria and South Africa, because they are more effective in solving the transaction cost problem associated with individual management of copyright.<sup>60</sup> Further, blanket licenses enable users to use any work in a CMO's repertoire at a fixed fee 'independent of the number of works actually used, the number of times each work is played, or the song's popularity'. They 'provide users with certainty from involuntary infringement, and they effectively price each additional performance of a work at its effective marginal cost (of zero)'.<sup>61</sup> However, to Katz and Sarid, blanket licenses may lead to an 'all-or-nothing regime' which 'forces most users to buy more

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<sup>55</sup> The international collecting societies' organisations include the International Confederation of Societies of Authors and Composers (CISAC); The International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction (BIEM); the International Federation of Reproduction Rights Organisations (IFRRO); and the International Federation of the Phonographic Industry (IFPI).

<sup>56</sup> Ficsor op cit note 4.

<sup>57</sup> MM Frabboni 'The changing market of music licenses' op cit note 3.

<sup>58</sup> Ibid at 150.

<sup>59</sup> Ficsor op cit.

<sup>60</sup> Frabboni op cit.

<sup>61</sup> A Katz and E Sarid 'Who killed the radio star? How music blanket licenses distort the production of music content' (2017) 19 available at <http://serci.org/wp-content/uploads/2017/10/Katz-Sarid.pdf>, accessed 10 May 2018 (cited with permission).

units than they wish at a higher price than they would otherwise pay'.<sup>62</sup> As will become apparent in 2.4.3 (below), the use of blanket licenses is at the core of the CMO competition discourse

It suffices now to note that, from the economic literature, the transaction cost argument forms a major justification for collective management.<sup>63</sup> Principally, the 'transaction cost theory focuses on the circumstances that in a real world with many kind of transactions, cost will accrue'.<sup>64</sup> Flowing from Coase's treatise,<sup>65</sup> transaction cost appears multi-dimensional. There is the search cost, which includes the cost of identifying potential trading partners and to gather information on them. There is also the contracting cost, which refers to the costs associated with negotiating and executing agreements. There is the monitoring cost, which includes the cost of checking compliance with an agreement and cost of tracking unauthorised uses. And there is the enforcement cost, which concerns the costs of dealing with a trading partner found in breach of an agreement.<sup>66</sup> With regards to copyright, the main question of transaction cost is 'how can one best correct inefficiency of the use and dissemination of [copyright works], triggered by the existence of transaction costs? By individual [...] or rather by collective rights management?'<sup>67</sup>

This is important especially in this era of widespread digitisation that has opened up easy and less costly alternatives for individual rights management by copyright owners and hence, calling to question the transaction cost justification of collective management. Nonetheless, the prevailing view, which this writer aligns with, is that collective management still remains an efficient means of rights management even in the face of digitisation. The argument is that through the acquisition of a worldwide repertoire, CMOs have become natural monopolies (explained in 1.1 above) because the worldwide repertoire makes it possible for CMOs to explore economics of scale and scope in rights management to the advantage of both copyright owners and

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<sup>62</sup> Ibid 16-17.

<sup>63</sup> SM Besen, et al 'An economic analysis of copyright collectives (1992) 78(1) *VLR* 383-411; G Hansen and A Schmidt-Bischoffshuansen 'Economic functions of collecting societies – collective rights management in transaction cost – and information economics' (2007) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=998328](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328), accessed on 7 March 2017.

<sup>64</sup> Hansen and Schmidt-Bischoffshuansen *ibid*.

<sup>65</sup> RH Coase 'The problem of social cost' (1960) 3 *JLE* 1-44.

<sup>66</sup> Z Zhang 'Rationale of collective management organizations: an economic perspective' (2016) 10(1) *MUJLT* 73-111.

<sup>67</sup> Hansen and Schmidt-Bischoffshuansen *op cit*.

users within the collective management and licensing market.<sup>68</sup> However, there is need for adaptation of collective management to adequately utilise the opportunities placed by digitisation in the area of rights management.<sup>69</sup>

The foregoing view is not shared in all quarters. Katz believes that CMOs' natural monopoly is a mere assumption because in practice there are other equally viable alternatives to take care of the transaction cost problem in rights management.<sup>70</sup> According to Katz, the transaction cost justification 'simultaneously proves too much and explains too little' because '[a]ccepting that management by individual authors on a per-work basis may be inefficient only implies that management will be done by different sorts of intermediaries; it explains why we have different kinds of [middlemen], not why it is necessary to have only one of them'.<sup>71</sup>

That notwithstanding, collective management affords copyright owners a platform for solidarity as discussed in 2.2 above.<sup>72</sup> Copyright owners will not enjoy the benefits of such solidarity when they act individually or through various intermediaries. Moreover, the transaction cost argument is two-sided. It can be viewed from the users' side also. Copyright users will prefer to deal with a single entity that can avail them all they want as far as rights clearance is concerned.<sup>73</sup> Collective management helps to reduce transaction cost for copyright owners as well as users. Viewed this way, the transaction cost argument, as a justification for collective management, is further fortified. Even so, Katz's argument is not without merit especially because the transaction cost theory propounded by Coase recognises that 'both changes in technology and costs of the mechanism used in lieu of market pricing' have a tendency of lowering or eliminating the net benefits of relying on CMOs.<sup>74</sup> Moreover, collective management does not totally wipe out the possibility of individual rights management. Collective management is only seen as the most preferred means in view of the capacity

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<sup>68</sup> Frabboni op cit note 3.

<sup>69</sup> M Hviid, et al 'Regulating CMOs by competition: an incomplete answer to the licensing problem?' (2016) 7(3) *JIPITEC* 256-270.

<sup>70</sup> Katz 'The potential demise' 1 and 2 op cit note 2.

<sup>71</sup> A Katz 'Copyright collectives: good solution but for which problem?' in H First, et al (eds.) *Working Within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (2010) 295-430 at 399.

<sup>72</sup> Kretschmer op cit note 10.

<sup>73</sup> DTI op cit note 5 at 56-57.

<sup>74</sup> BH Kobayashi 'Opening Pandora's Black Box: a Coasian 1937 view of performing rights organizations in 2014' (2015) 22(4) *GMLR* 925-942.

for CMOs to solve transaction cost problem and bring about efficiency in the collective management and licensing market. Thus, collective management is usually adopted in situations where individual rights management is practically impossible, and given the nature of the copyright market as alluded to above, such situations are rife.

Even so, the justification of collective management does not rest on the transaction cost argument alone. There is the theory of aggregation and syndication projected by Watt, while exploring the types of contracts being executed in the collective management and licensing market. According to Watt, CMOs ‘form contracts at two principal points along the supply chain’. First, there is the contract among copyright owners who are members of the CMO for distribution of the royalties collected by the CMO. Secondly, there are the licensing contracts executed by CMOs with users of the CMO’s repertoire. Based on the aggregation and syndication theories, Watt contends that ‘there are significant efficiency benefits from having copyrights managed as an aggregate [repertoire], rather than individually, based on risk-pooling and risk-sharing through the contracts between the members themselves. Similarly, there are also aggregation benefits [...] of licensing only the entire [repertoire], rather than smaller sub-sets’ of copyright. Thus, Watt rightly believes, in my view, that despite the possibility of digitisation to reduce transaction cost (as discussed 2.4 below), it has not waned the relevance of collective management because with collective management, individual CMOs can easily tackle the problem of widespread piracy resulting from digitisation. Also, CMOs are better placed to deploy the advantages of digitisation for rights management to the benefit of copyright owners. However, to be more efficient, Watt canvasses for a system where royalties are not distributed among copyright owners on the bases of actual usage of their works but on the bases of negotiated royalty distribution independent of actual usage of copyright works. To Watt, this system is more aligned with the theory of aggregation and syndication.<sup>75</sup> But does the existence of CMOs in the manner envisaged by Watt and the transaction cost theorists not eliminate competition among rights owners and thus calls to question the need for CMOs from a competition point of view? This question will be addressed in 2.4.3 below.

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<sup>75</sup> R Watt ‘The efficiencies of aggregation: an economic theory perspective on collective management of copyright’ (2015) 12(1/2) *RERCI* 26-44.

For now, it is important to state that the pervasiveness of collective management is entrenching a collectivisation movement within copyright regimes. This appears to be downplaying the individualistic foundation of copyright.<sup>76</sup> Put differently, in order to enjoy the benefits afforded by the collective management system, copyright owners tend to give up their exclusivity by way of rights transfer to CMOs. According to scholars, this is causing a shift from property rules based on copyright exclusivity to liability rules based on collectivisation.<sup>77</sup> Property rules have been briefly described above. It remains to be observed that in ‘economic terms, liability rules refer to a legal structure where third parties are allowed to use the protected subject matters without prior authorisation from rights holders, provided that they pay compensation’.<sup>78</sup> Although property rules and liability rules tend to be theoretically opposed, ‘the main practical difference between [them] is that the former entitles the right owner to claim for an injunction when third parties use the protected subject matter without prior authorisation, whereas the liability rules only provide for compensation’.<sup>79</sup> Within the context of collective management, this distinction is better appreciated through the prism of the classification of CMOs, in 2.2 above, as exclusive rights CMOs (property rules) and remuneration rights (liability rules), which as stated above, has implications on the extent to which competition law may be applied to collective management.

#### **2.4.2 Impact of digitisation on collective management**

Digitisation affords both challenges and opportunities to collective management. It is now possible to distribute, stream and download sound recordings, musical videos, and movies on the Internet. The same applies to literary and other copyright works. The challenges and opportunities of digitisation are underpinned by the borderless nature of the Internet, the fragmentation of licensing practices and the proliferation of distribution channels.<sup>80</sup>

The challenges thrown up by digitisation include questions of the nature of rights associated with digital contents, protection of the rights and the extent and manner of enforcement of such rights. It also includes questions of the applicable law

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<sup>76</sup> Lorrain op cit note 40.

<sup>77</sup> Schovsbo op cit note 5; Lorrain, *ibid*.

<sup>78</sup> Lorrain, *ibid*.

<sup>79</sup> *Ibid*.

<sup>80</sup> S Haunss ‘The changing role of collecting societies in the internet’ (2013) 2(3) *IPR*.

especially since there is, strictly speaking, no international copyright law.<sup>81</sup> Further, CMOs evolved as national monopolies. National laws bind their operations. Although, they have been able to adapt to the technological changes in the analogue world, digitisation calls to question their continued relevance. This is more so when viewed from the perspective that digitisation affords opportunity for individual rights management and other rights management systems with low transaction cost. Such rights administration includes the reliance on online rights aggregators,<sup>82</sup> the deployment of blockchain technology and the use of Creative Commons licenses.<sup>83</sup>

In view of the foregoing, there are two extreme views about the impact of digitisation on collective management. On the one hand, there is the suggestion that digital technology such as blockchain and other online rights aggregation platforms have the propensity to displace CMOs in the digital environment. On the other hand, these digital infrastructures are also being regarded as a mere hype without any real threat to collective management. However, as the following discussion shows, the impact of digitisation on collective management is somewhere in between the above extremes.

Katz is a leading voice among the scholars with the view that digitisation has eroded the need for CMOs in modern days. The author had earlier prophesied of the demise of CMOs as natural monopolies as a result of the growth of alternative rights management platforms made possible by digitisation.<sup>84</sup> Indeed, the opportunities for digital rights management (DRM) offered by digitisation has made individual rights management attractive to copyright owners, especially large corporations owning substantial amount of repertoire. Studies show that large copyright owners, such as EMI and Sony, have set up special entities for management of their on-line rights.<sup>85</sup> For this purpose, the copyright owners withdrew their online rights from CMOs to

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<sup>81</sup> The existing international copyright treaties only set minimum standards that signatory states should not deviate from when legislating copyright. Even so, these treaties recognise the principle of territoriality: copyright protection only to the extent as provided within national legislations.

<sup>82</sup> YW Chin 'Copyright collective management in the twenty-first century from a competition law perspective' in S Frankel and D Gervais eds. *The Evolution and Equilibrium of Copyright in the Digital Age* (2015) 269-284.

<sup>83</sup> See B Bodo et al 'Blockchain and smart contracts: the missing link in copyright licensing?' (2018) *International Journal of Law and Information Technology* 1-26; E Fabian 'Blockchain, digital music and lex mercatoria' (2017) 14 *US-China Law Review* 852-863; H Hietanen 'Collecting societies and creative commons licensing' in Bourcier D et al (eds.) *Managing Creative Works in a Digital World* (2010) 199-222.

<sup>84</sup> Katz, Potential demise 2 op cit note 2.

<sup>85</sup> Kobayashi op cit note 74.



which they initially transferred such rights.<sup>86</sup> These large rights owners are able to explore DRM systems because of the large repertoire they control. They also have the capacity to utilise the opportunities afforded by the Internet. These factors put transaction cost in their favour as against small rights owners. But the small rights owners still have to rely on CMOs for management of their rights in the digital sphere. The reason for this is not far-fetched. Individually, small copyright owners do not possess the necessary repertoire, which will make them attractive to online users. Furthermore, as a result of digitisation, there is the growing trend among copyright owners to provide selected works or even relevant parts of their repertoire under non-exclusive open content licenses, for example, under a Creative Commons license.<sup>87</sup> From a CMOs perspective, this may make licensing more difficult because it may introduce an additional task of determining whether and for which work royalty should be collected.<sup>88</sup>

Interestingly, through global networks, CMOs are also able to explore DRM systems for rights management on the Internet.<sup>89</sup> The international organisations of CMOs already developed comprehensive Internet databases of copyright works under the repertoire of their member CMOs.<sup>90</sup> This gives CMOs an advantage in terms of digital rights management over other individual platforms. As Schwemer observed, major European CMOs formed subsidiary to manage their online repertoire.<sup>91</sup>

The existence of several licensing platforms on the digital sphere has implications on the user side of the market, especially multimedia uses. The existence of various licensing entities on the Internet sphere will complicate rights clearance for such multimedia users. Multimedia uses usually involve multiple rights clearance from various copyright owners across several borders. Notwithstanding the ease of tracking individual copyright owners in the digital sphere, obtaining such authorisation would

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<sup>86</sup> SF Schwemer 'Emerging models for cross-border online licensing and user-generated law' (2015) *UCFLLS Research Paper Series*, Paper No. 2015-9.

<sup>87</sup> Haunss op cit note 80.

<sup>88</sup> Ibid; Hietanen op cit note 83.

<sup>89</sup> BR Day 'Collective management of music copyright in the digital age: the online clearinghouse' (2010) 18(2) *TIPLJ* 195-236; D Gervais 'Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation' (2003) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1920391](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920391), accessed on 7 March 2017.; JJ Baloyi 'The protection and licensing of music rights in Sub-Saharan Africa: challenges and opportunities' (2014) 14(1) *JMEIEA* 61-87.

<sup>90</sup> Ficsor op cit note 4 at 101-102

<sup>91</sup> Schwemer op cit note 86.

not be an easy task for such users. The situation is even worse assuming a user has to bypass these online licensing platforms and obtain licenses directly from all CMOs in every territory its multimedia services are accessed. Such users will prefer to obtain a single license from a single source covering all relevant works and with global coverage (a multi-repertoire multi-territorial license). In the circumstance described above, the major challenge of a user is how to obtain such license.<sup>92</sup>

To resolve the foregoing challenges CMOs devised the idea of a one-stop-shop multi-territorial license. The International Federation of the Phonographic Industry (IFPI) with a number of CMOs developed the Simulcasting agreement.<sup>93</sup> The aim of the agreement was ‘to safeguard the traditional system of a one-stop-shop for multi-repertoire licenses while adding the crucial feature that online use can be multi-territorial’.<sup>94</sup> The agreement was used as a basis for providing cross-border or multi-territorial licenses, on behalf of owners of rights in sound recordings, for Internet radio.<sup>95</sup> The Santiago agreement was also crafted by BMI (USA), Performing Rights Society (PRS – UK), Society of Authors, Composers and Publishers of Music (SACEM – France), *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA – Germany) and *Vereniging BUMA* (BUMA – Netherlands). The Santiago agreement sought to adapt the traditional framework of collective management to the digital sphere by allowing each of the participating societies to grant one-stop-shop licenses which included the music repertoires of all member societies and which were valid in all their territories.<sup>96</sup> The International Bureau of Societies Administering the Rights of Mechanical Recordings Reproduction’s (BIEM) Barcelona agreement also aimed to achieve same goal. However, ‘soon after the two standard agreements were reached, the Directorate General Competition of the [EU] expressed competition concerns regarding a customer allocation clause contained in both agreements – despite its support for the underlying one-stop shop principle. The agreements have not been renewed and concluded

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<sup>92</sup> Haunss op cit note 80.

<sup>93</sup> ‘Simulcasting is defined as the simultaneous transmission by radio and TV stations via the internet of a sound recording that is included in the broadcasts of radio and/or TV signals’: Graber op cit note 19, fn18.

<sup>94</sup> R Hilty and S Nerisson ‘Collective Copyright Management and Digitization: The European Experience’ (2013) *MPIIPCL Research Paper No.13-09* 12.

<sup>95</sup> Hviid, et al op cit note at 69.

<sup>96</sup> ‘Music Royalties Deal Breaks Competition Law, says Commission’ 4 May 2004 Out-Law.com available at <http://www.out-law.com/page-4506>, accessed on 8 March 2017.

respectively.’<sup>97</sup>

However, the IFPI Simulcasting agreement got clearance by the European Commission (EC) under the EU competition rules. It should be noted that the usage of the IFPI Simulcasting agreement is highly doubtful. Its utility seems to have been undermined by later developments in the EU (highlighted below) aimed at fostering competition in the online management of musical copyright by fostering multi-territorial licenses for individual repertoire of CMOs as against the on-stop-shop system, which the Simulcasting agreement represented.<sup>98</sup>

There was also the CISAC model agreement devised to allow CISAC members to offer multi-repertoire licenses with multi-territorial effect.<sup>99</sup> The CISAC model agreement had the effect of transferring the monopoly status of CMOs in the analogue domain to the digital sphere. The CISAC agreement was ruled against by the EC because it raised vital competition law concerns, such as concerted actions on the part of the CMOs concerned, and membership and territorial restrictions under art.101 Treaty on the Functioning of the European Union.<sup>100</sup> But the CJEU overturned the EC’s ruling in 2013. To decide the issues of membership and territorial restrictions, the CJEU first had to consider whether the model agreement amounted to concerted actions among CISAC members. It found that the EC ‘has not proved to a sufficient legal standard the existence of a concerted practice relating to the national territorial limitations’.<sup>101</sup>

The need to foster competition in the online music market induced the EU to adopt a Directive in 2014,<sup>102</sup> relevant provisions of which will be relied upon when examining the specific competition concerns in chapter five below. It suffices now to

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<sup>97</sup> Schwemer op cit note 86 at 4.

<sup>98</sup> Commission Decision No. COMP/C2/38.014 – IFPI ‘Simulcasting’ of 8 October 2002 relating to a proceeding under art.81 of the EC Treaty and art.53 of the EEA Agreement. See also, J Drexler *Copyright, competition and development* (2013).

<sup>99</sup> Hviid, et al op cit note 69.

<sup>100</sup> Commission Decision COMP/C2/38.698 – CISAC of 16 July 2008 relating to a proceeding under art. 81 of the EC Treaty and art.53 of the EEA Agreement.

<sup>101</sup> *CISAC v European Commission*, unreported case T-442/08 (12 April 2013), para 182.

<sup>102</sup> EU Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online use in the Internal Market (2014) Directive 2014/26/EU available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=en>, accessed on 8 March 2017. It should be noted that the journey to the directive began with the EC Recommendation on collective rights management of music on the Internet (2005) Recommendation 2005/737/EC available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005H0737&from=EN>, accessed on 7 March 2017.

mention that the Directive forms the focus of ample literature which point out its weakness even when it was still at the proposal stage. One major flaw being that the Directive seems to create uncertainty and instability: that it is aiming to promote competition in the EU online music market, by focusing on the economic services of CMOs while ignoring their socio-cultural functions through which they promote cultural diversity and creativity.<sup>103</sup>

The proponents of this view, with which this writer aligns, take the position that it is important to not ignore the socio-cultural functions of CMOs when determining collective management competition related issues. Although the focus of competition law is primarily on the economic aspect of collective management, competition law makers and enforcers should also bear in mind the socio-cultural functions of CMOs. Moreover, CMOs, as monopolies, ensure efficiency in the copyright management and licensing market through the totality of their economic and socio-cultural role by which they ensure the achievement of copyright law's goal of promoting creativity. Thus, competition law should be applied to CMOs in a manner as not to erode their monopoly. Rather, the focus should be on the exercise of the monopoly.

#### **2.4.3 CMOs' competition concerns**

Flowing from the discussion in 2.4.1 and 2.4.2 above, the main question to be addressed under this sub-heading is whether from a competition perspective, the existence of CMOs as natural monopolies is still relevant in the light of the existence of alternative rights management platforms and the possibility of individual rights management as a result of digitisation. Put differently, should CMOs' natural monopoly be preserved by regulation while preventing them from abusing their dominance in the relevant collective management and licensing markets or should the question of competition be left to be determined by market forces of demand and supply. A resolution of this issue will help to determine if there is a need for the regulation of CMOs from a competition law perspective.

Lenard and White prefer a competitive system of collective management fostered by market forces. In their study of collective management in the US music

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<sup>103</sup> L Guibault 'The Draft Collective Management Directive' in I Stamatoudi and P Torremans (eds.) *EU Copyright Law: A Commentary* (2014) 763; A Dietz 'The European Commission's proposal for a directive on collecting societies and cultural diversity – a missed opportunity' (2014) 3(1) *IJMBR* 7-25; L Guibault and S van Gompel 'Collective management in the European Union' in D Gervais D Gervais (ed.) 3rd ed. *Collective Management of Copyright and Related Rights* (2016) 139-174.

industry and the impact of digitisation, the authors conclude that regulation of the US music CMOs through consent decrees and the Copyright Royalty Board has further entrenched the CMOs' natural monopoly. As stated in 2.2 above, the Copyright Royalty Board and consent decrees regulate royalties charged, among others, by CMOs in the US. Lenard and White argued that while such monopoly is very relevant in the analogue world in that it is obtained from CMOs capacity to solve transaction cost problems, same cannot be said of the digital environment. The authors believe that digitisation makes licensing, monitoring and usage of copyright works easy and at reduced transaction costs. The authors took cognisance of the fact that major copyright owners are withdrawing their online rights from CMOs and managing it themselves. They also noted the rise of online right aggregators that have made music licensing transactions cheaper and easier. However, they argue that despite these developments, continuous regulation through the Copyright Royalty Board and consent decrees have solidified collective management and made CMOs more dominant in the US music market. Thus, the authors believe that a move away from the regulatory system to a system where licensing prices are determined largely by the cost of music production, demand and supply subject to competition law oversight will bring about the desired competition especially in this digital era.<sup>104</sup>

Kobayashi seemed to share similar reasoning with Lenard and White. He recognised that digitisation, and the regulatory mechanisms through the Copyright Royalty Board and consent decrees instead of market pricing, have lowered the benefits of collective management and this gave rise to the withdrawal of online rights by major copyright owners from CMOs in the US. But the regulatory framework under the consent decrees still acts as barriers for copyright owners to withdraw their online rights. As interpreted by the rates court in the US, copyright owners are prevented from partial withdrawal under the consent decrees, which only allow complete withdrawal of rights by copyright owners from CMOs.<sup>105</sup> Kobayashi argued that this would lead to abandonment of the regulatory regimes and acceleration of innovative technological

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<sup>104</sup> TM Lenard and MJ White 'Moving Music Licensing into the Digital Era: More Competition and Less Regulation' (2015) available at [http://www.cresse.info/uploadfiles/2016\\_pl1\\_pa1.pdf](http://www.cresse.info/uploadfiles/2016_pl1_pa1.pdf), accessed on 6 March 2017.

<sup>105</sup> See *In re Petition of Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broad.Music, Inc.v.Pandora Media, Inc.*, 109 U.S.P.Q. 2d 1964 (S.D.N.Y. 2013).

solutions to lower transaction costs associated with music licensing. The effect of this would be more competition and lower prices for music licenses.<sup>106</sup>

However, according to Fujitani, price competition is ordinarily not an important factor in copyright licensing because users are rarely influenced by price while choosing a copyright work. Users are mainly influenced by the unique quality of the copyright work informed by their social tastes and aesthetic preferences. Similarly, copyright owners are eager to license their works because of the gains of widespread usage of their works: that is, ‘more lucrative sales’, among others. Thus, according to the author, ‘artificial attempts to inject competition into [copyright licensing] market place are unlikely to ensure that users can secure [licenses] at [lower] costs’.<sup>107</sup> In my view, assuming price competition is an important factor, it may not be of much economic benefit to copyright owners within the context of collective management. Indeed, according to Riis, if CMOs offer

‘[...] licences of the same repertoire covering the same territories, and if they compete solely on price, economic reasoning suggests that licences will be priced at marginal cost. The marginal cost in [collective management] is relatively low, and pricing at marginal costs implies that collective licensing of copyright is unprofitable to authors. This scenario results in a race to the bottom that gradually erodes the value of the copyrights’.<sup>108</sup>

Aligning with the above view, Schild contends that reliance on market forces to bring about competition in collective management is ‘unlikely to lead to results beneficial to all stakeholders’.<sup>109</sup> Schild’s view seemed to resonate with Besen, *et al.* In their economic analysis of collective management in the US, the authors recognised the benefits of CMOs as natural monopolies. Yet, to the authors, competition in collective management, promoted by regulation and not market forces, will ensure the required efficiency. The authors identified three reasons for the absence of competition in collective management: that is (a) regulation authorising one CMO for a particular right; (b) regulation mandating CMOs to accept and treat equally all copyright owners within the class of rights managed by the CMOs; and (c) efficient negotiation of licenses between CMOs and user groups. To promote competition, the authors prefer

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<sup>106</sup> Kobayashi *op cit* note 74.

<sup>107</sup> JM Fujitani ‘Controlling the market powers of performing rights societies: an administrative substitute for antitrust regulation’ (1984) 27 Cal LR 103-137.

<sup>108</sup> T Riis ‘Collecting societies, competition, and the service directives’ (2011) 6(7) *JIPLP* 482-492 at 487.

<sup>109</sup> AL Schild ‘Collecting societies and competition law: an overview of EU and national case law’ (2012) *e-Competitions Competition Law Bulletin* 1-17 at 12.

a regulatory system that allows CMOs to discriminate against copyright owners of the class forming their repertoire and refuse them membership. Such framework will enable individual management and/or entry of new CMOs to manage the copyright rejected by the existing CMO and bring about competitive licensing.<sup>110</sup> In a competitive licensing system,

‘[CMOs] would employ agents to prevent unauthorised performances of [their] members’ works, but the members would set their license fees independently as they competed for the patronage of licensees. Each user would be free to determine the number of songs for which he or she obtained licenses, and the aggregate fee paid by a licensee would depend both on the number of works used and the fees set by copyright [owners]’.<sup>111</sup>

Aligning with the foregoing, Katz is of the view that regarding CMOs as natural monopolies on the basis of their capacity to solve transaction cost problem in the copyright market ‘proves too much and explains too little’.<sup>112</sup> He points out that even in the analogue world, for which the transaction cost argument is projected as justification for CMOs, alternatives exist for efficient copyright licensing, through per-work or per-program (transactional) licensing, at reduced cost. The author forecasted that with the growth of digital technology, copyright licensing will become easier and cheaper, hence displacing the transaction cost argument in favour of CMOs. Like Besen *et al*, Katz believes that regulatory frameworks should promote competition in collective management. To achieve this, the author recommends a regulatory system that not only empowers CMOs to refuse membership, but also prevents CMOs from requiring their members to grant them exclusive licenses over their works.<sup>113</sup>

Chin agrees with Katz and Besen *et al*. Chin’s argument is hinged on the possibilities brought about by digitisation: individual rights management and management through internet rights aggregators, such as Google’s YouTube and Google Books. These aggregators ‘aggregate rights so that users may access them readily; enable users to obtain licenses [...] in some cases directly from [copyright owners]; and facilitate payment of license fees to [copyright owners]’. To the author, CMOs may only be useful in enforcement which is outside the purview of aggregators.

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<sup>110</sup> Besen, *et al* op cit note 63.

<sup>111</sup> Ibid at 407-408.

<sup>112</sup> A Katz ‘Copyright collectives: good solution but for which problem?’ in H First, *et al* (eds.) *Working Within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (2010) 295-430

<sup>113</sup> Katz ‘The potential demise 1 op cit note 2; Katz ‘The potential demise 2 op cit note 2.

Even so, Chin pointed out that digitisation has made monitoring of usage very easy for copyright owners.<sup>114</sup> Thus, he believes that

‘unless there are compelling reasons, legal requirements leading to monopoly that in turn require regulation should be eliminated and competition among [CMOs] should be fostered, so that [copyright owners] and users may have greater choice and hopefully receive better terms overall. [...] transparency and efficiency are likely to increase as a result’.<sup>115</sup>

The respective treatises of Besen et al’s, Katz and Chin are focused mainly on how to promote competition within the collective management and licensing markets by fostering a system that ensure the existence of more than one CMO and other licensing platforms including through individual licensing. Scholars, such as Katz and Chin believe that the existence of more than one CMO or licensing platforms is indicative of competition within the copyright collective management and licensing market. First, while this argument may not be faulted from an economics point of view, it does not necessarily reflect the notion of competition within the context of collective management given the special nature of goods (copyright) being administered by CMOs. First, as shown below, the existence of more than one CMO or licensing platforms for a class of copyright within a given collective management and licensing market does not necessarily indicate competition in practice within that market. In the context of collective management, both CMOs or other licensing platforms existing in the market for a class of copyright can still exist as monopolies in respect of the copyright works forming their respective repertoire. This is so because the repertoire of each CMO in the market forms a distinct, but complementary, product for users of the copyright works. Moreover, in putting their repertoire together, the CMOs are not only creating distinct products, but are also resolving the transaction cost problems relating to licensing and royalty collection for copyright owners and users within the particular collective management and licensing markets.

Secondly, and more importantly, the arguments put forward by Besen et al, Katz and Chin seem to overlook the socio-cultural role of CMO and appear to limit their analysis to copyright licensing only. As, canvassed in 2.2 and 2.4.1 above, CMOs do not only solve the problem of access in the copyright market, they also ensure the promotion of art, creativity and social welfare. Thus, while CMOs raise some competition concerns, especially in their relationship with copyright owners and users,

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<sup>114</sup> Chin op cit note 82.

<sup>115</sup> Ibid at 280.



the efficiencies they bring to the copyright management and licensing markets through their socio-cultural functions cannot be ignored when considering the issue of their monopoly.<sup>116</sup>

Thirdly, *Besen*, et al, Katz and Chin seem to base their arguments on the premise that the existence of CMOs as monopolies eliminates competition among the copyright owners whose works make up the repertoire of the CMOs. The belief is that CMOs can be regarded as arrangements between competitors (copyright owners), which results in the elimination of competition among the competitors who, through the CMOs collude in fixing prices. This form of arrangement involving companies providing telephone network connectivity has been regarded, by the US Supreme Court under US competition (antitrust) law, as the ‘supreme evil’ of antitrust. This was in the case of *Verizon Communications v. Law Offices of Curtis V. Trinko*,<sup>117</sup> which arose in the US telecommunications industry. The case involved an arrangement between competitors in the television network connectivity market.

However, the collective management and licensing markets envisaged under copyright law varies from other markets, such as the telephone network connectivity market in the telecommunications industry. Collective management and licensing markets exist only because of copyright law, which requires users of copyright works to secure consent from the copyright owner, or be liable to pay damages for infringement or face criminal sanctions as the case may be.<sup>118</sup> Also, the lawmakers did not intend to weaken the power of copyright owners to control the use of their works beyond the exceptions and limitations stipulated by copyright law. Furthermore, copyright law does not vest copyright owners the power to fix prices collusively. Viewed this way, it becomes apparent that an arrangement in other markets readily accepted as price fixing under competition law may pass scrutiny if the arrangement occurred within the context of the collective management and licensing markets. The foregoing formed the rationale for the acceptance of CMOs by the US Supreme Court, in the celebrated case of *BMI v CBS*,<sup>119</sup> as organisations of copyright owners (competitors) that are not price fixing cartels. According to the court, CMOs constitute market arrangements among copyright owners that are reasonably necessary for the

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<sup>116</sup> Dietz op cit note 103.

<sup>117</sup> 540 U.S. 398, 408 (2004).

<sup>118</sup> See SA Copyright Act, ss23 to 27; Nigerian Copyright Act, ss15 to 20.

<sup>119</sup> *BMI v CBS*, 441 U. S. 1 (1979).

enjoyment of the economic benefits of their copyright and, as such, cannot be declared *per se* illegal under competition law without convincing evidence of how such arrangement limits competition in the market. Moreover, the blanket licenses crafted by CMOs are distinct products of the CMOs. Thus, from a competition law perspective, a CMO cannot be regarded as ‘a joint sales agency offering the individual goods of many sellers, but [as] a separate seller offering its blanket license, of which the individual [copyright works] are raw material’.<sup>120</sup>

The foregoing position finds support in Drexl who believes that the argument put forward by Katz and other writers stated above ‘seem to pursue allocative efficiency as the goal of regulation’ while ignoring the ‘essential copyright goal of promoting creativity’. As will be discussed in more depth in chapter five below, copyright, like competition law, ultimately promotes ‘creativity in the sense of dynamic competition’ as against static competition or ‘pure price competition’.<sup>121</sup> Further, Drexl observed that empowering CMOs to reject copyright owners would mean CMOs ‘have to identify the [work] they want to offer to users. In such a system, CMOs, as regular market participants, have to base their decision on a business rationale. Given the superstar phenomenon, they face the difficult task of predicting what [work] will be successful in the future’.<sup>122</sup>

Moreover, as argued elsewhere, it is not easy to tell in advance which work will become successful in the future and confer superstar status on the creator/owner of the work. The success of a work, and superstar status of the creator, largely depends on the ever-changing users’ tastes.<sup>123</sup> The result of this, according to Drexl, is that CMOs will have to take the economic risk of gauging average tastes before accepting copyright owners as members. A very likely consequence in this regard would be that CMOs will only accept owners of popular works, while leaving out owners of unpopular works who may likely be absorbed by another CMO. Ultimately, this would lead to the existence of different CMOs specialising,<sup>124</sup> for instance, in the management of copyright in different genres of music or different class of literature. The net effect of

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<sup>120</sup> Ibid.

<sup>121</sup> J Drexl ‘Collecting societies and competition law’ (2007) 6 available at [http://www.ip.mpg.de/shared/data/pdf/drexl-cmos\\_and\\_competition.pdf](http://www.ip.mpg.de/shared/data/pdf/drexl-cmos_and_competition.pdf), accessed 20 October 2014.

<sup>122</sup> Ibid at 21.

<sup>123</sup> K Thakker ‘The conflict between E.U. collecting societies and E.C. competition law’ (2009) 16 *CJEL* 121-129; IL Pitt ‘Superstar effects on royalty income in a performing rights organisation’ (2010) 34(3) *JCE* 219-236.

<sup>124</sup> Drexl op cit note 121.

such specialisation would be the existence of specialised monopolies with whom copyright users will have to negotiate separate licenses, hence leading to the fragmentation problem highlighted in 2.4.1 above. This situation is true of the analogue, as well as digital, environment. In the digital environment, although copyright owners' transaction costs may reduce (especially large copyright owners), studies show, as discussed in 2.4.2 above, that the users would not be so fortunate. Online multimedia users would have to identify individual copyright owners, different rights aggregators and CMOs managing online rights. This would be worse where the license required relates to multi-territorial uses.<sup>125</sup>

It is important to emphasise that the existence of more than one CMO or licensing platforms for a class of copyright owners is not indicative of competition on the user side of the market. The repertoires of the respective CMOs are not 'perfect substitutes' to each other.<sup>126</sup> They are mainly complementary. The repertoires 'may well be indispensable for the users to offer an attractive programme' to their clients.<sup>127</sup> In essence, to be properly covered, a copyright user would be interested in obtaining blanket licenses from both CMOs. Thus, the CMOs would not be forced by market forces to reduce their tariffs in order to attract users. Indeed, CMOs would be inclined to collude for the purpose of obtaining higher tariffs from copyright users. However, the existence of more than one CMO may indicate competition on the copyright owners' side of the market. This is so because the CMOs would be interested in beefing up their respective repertoire. For this purpose, the respective CMOs may offer packages that are attractive to copyright owners, especially those regarded as successful mainstream artists.<sup>128</sup> This may come in form of promises of high royalty returns and lower administrative costs per copyright owner. In economic terms, collective management 'causes high fixed cost but relatively low marginal cost for the management of an additional work' with the effect that the larger CMO would be better placed to deploy economics of scale and become established as a natural monopoly.<sup>129</sup> The downside of this is that such larger CMO would place prohibitively high market

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<sup>125</sup> Hviid, et al op cit note 69; S Schroff and J Street 'The politics of the Digital Single Market: culture vs. competition vs. copyright' (2017) *ICS* 1-17; C Handke 'Joint copyrights management by collecting societies and online platforms: an economic analysis' (2016) available at [http://eventos.uva.es/file\\_manager/get\\_paper/4678](http://eventos.uva.es/file_manager/get_paper/4678), accessed 38 March 2018.

<sup>126</sup> Thakker op cit note 123.

<sup>127</sup> Drexel op cit note 98 at 217.

<sup>128</sup> Thakker op cit note 123; Pitt op cit note 123.

<sup>129</sup> Drexel op cit note 98 at 216.

entry barriers (in form of membership discrimination and exclusivity of license) for potential competitors.

Collective management in needletime rights in South Africa justifies the foregoing argument. As further discussed in chapter four below, SAMPRA and IMPRA currently administer needletime rights. While SAMPRA represents members of Recording industry of South Africa (RiSA) and SAMRO, IMPRA represents independent producers and performers of South Africa. There is no indication of competition for membership and users between the CMOs. They both have clear cut membership base and users would usually obtain licenses from both of them. Another justification may be found in the US. Here, ASCAP, BMI and Society of European Stage Authors and Composers (SESAC) administer the performing rights in music for their respective members. However, until 1930 when SESAC was formed, ASCAP was the only CMO. The emergence of SESAC, and later BMI in 1940, was because of ASCAP's membership discrimination and prohibitive tariff structure respectively.<sup>130</sup> At this time, the CMOs were not under any regulation. Consent decrees informed by US anti-trust regulations were later introduced to regulate them.<sup>131</sup> Even so, competition seems absent among the CMOs in the licensing market (user side) because of the complementarity of their repertoire from user perspective.<sup>132</sup>

That being said, the competition promotion argument seems to ignore the socio-cultural function played by CMOs through which copyright's role of promoting cultural diversity may be achieved. CMOs' socio-cultural role has been highlighted in 2.2 above. It does not need restatement here. Suffices to note that allowing CMOs to reject copyright owners would take away the cross-subsiding effect of collective management and lead to more administrative cost per copyright owner since the rejection may result in membership reduction for CMOs. This will largely be to the detriment of small copyright owners but to the benefit of few large copyright owners. The reduction in membership and existence of more CMOs will also reduce the bargaining power of copyright owners against large corporate users. It will also

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<sup>130</sup> J Lopez-Sintaz, *et al* 'The Social Construction of Music Markets: Copyright and Technology in the Digital Age' in J Lopez-Sintaz (ed.) *The Social Construction of Culture Markets: Between Incentive to Creation and Access to Culture* (2015) 101-121; A Adewopo 'Music Lesson and Collective Administration' (2014) available at <https://nec.ng/music-lesson-and-collective-administration-adebambo-adewopo/>, accessed on 10 June 2017.

<sup>131</sup> Adewopo, *Ibid*.

<sup>132</sup> Drexel op cit note 98 at 217.

displace the risk-sharing platform afforded to copyright owners by CMOs through deployment of aggregation and syndication discussed in 2.4.1 above.<sup>133</sup>

In view of the foregoing, a more effective approach, from a competition law perspective, would be a regulatory framework which preserves the monopolistic nature of CMOs while giving room for some form of competition among copyright owners, within a CMO's fold, that promotes creativity and cultural diversity. Such framework would enjoin CMOs to accept copyright owners of the class forming their repertoire on a non-discriminatory basis, while preventing them from insisting on exclusive licensing from copyright owners. Drexl agrees with this approach when he posited that

‘creative competition requires exclusion of competition between [CMOs] as a condition for equal market opportunities of all works. Creative competition, however, should not be misunderstood as an exclusion of competition as such. It actually promotes competition between a larger number of works and culturally more diverse works at the price of restraining competition between [CMO]. In addition, equal market access does not cause anticompetitive effects to the disadvantage of more popular works [...]. only the principle of equal market access guarantees that customers will decide on the popularity of works, without being restricted in their choice by pre-selection by [CMOs]. Accordingly, a model of creative competition provides a much more open and dynamic market for copyrighted works’.<sup>134</sup>

Although CMOs may be regarded as classic manifestation of market dominance and price-fixing cartel among ordinarily “competing” copyright owners, the foregoing informs competition law's toleration of CMOs as ‘necessary evils’.<sup>135</sup> In other words, competition courts, especially from the US and EU, have regarded CMOs as not *per se* illegal under competition law. The courts' attitude has been to preserve the monopoly of CMOs, which emerged from their ability to solve transaction cost problems related to licensing through the use of blanket licenses.<sup>136</sup> This is achieved, however, by a balancing exercise. The courts weigh CMOs' role against the freedom of copyright owners to dispose of their works, the need for effective collective management, the socio-cultural role of CMOs, and the need to foster competition in the copyright market. Specifically, blanket licenses have been declared as agreements that are not

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<sup>133</sup>J Drexl, et al ‘Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372’ (2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2208971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208971), accessed on 28 March 2018; R Watt ‘The efficiencies of aggregation: an economic theory perspective on collective management of copyright’ (2015) 12(1/2) *RERCI* 26-44.

<sup>134</sup>Drexl op cit note 46 at 22.

<sup>135</sup>N Gallini ‘Competition policy, patent pools and copyright collectives’ (2011) 8(2) *RERCI* 3-34.

<sup>136</sup>Generally, see *BMI v CBS*, supra note 119; *BRT v SABAM* (1974) ECR 51; *OSA v Lecebne Lazne* Case C-351/12 (27 February 2014).

price-fixing. They have been held to be pro-competitive because they developed as a new product to help CMOs achieve their purpose. Further, CMOs as monopolies have been tested under the market dominance rules through the rule of reason approach and have also been found to be pro-competitive because of their role that promotes creativity, social welfare and efficiency in the copyright management and licensing markets.<sup>137</sup>

Flowing from the foregoing, a more efficient approach in the regulation of CMOs, from competition law perspective, is not to prevent their existence as dominant entities in the copyright management and licensing markets. The approach is to prevent the abuse of their monopoly by subjecting CMOs to efficiency, transparency and accountability standards in their relationship with copyright owners; users; and among themselves. In pursuit of this objective, competition law seeks to address specific competition concerns such as (a) abuse of market dominance, excessive pricing (royalties), (b) refusal to license, (c) refusal to accept copyright owners as members, (d) discrimination between copyright owners and (e) discrimination between users, among others.<sup>138</sup> CMOs will then be scrutinised under the rules against restrictive agreements, abuse of market dominance and merger control. These rules and whether they have been captured in the copyright sector-specific regulation regimes for CMOs in Nigeria and South Africa will be deeply examined in chapter five below.

## 2.5 Regulation of collective management

Although collective management emerged from private initiative of copyright owners, it is currently being subjected to some form of government regulation.<sup>139</sup> However, there are arguments against this trend on the thought that ‘the legislature or judiciary is inherently inferior to industry insiders in shaping a proper framework for the commercialisation of copyright’. Further, that ‘the spontaneously founded [collective management] illustrate the ability of the industry to create its own solutions on the basis of property rights’.<sup>140</sup> An in depth discussion of these issues is not intended here, safe

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<sup>137</sup> *BMI v CBS* supra; *BRT v SABAM*, supra.

<sup>138</sup> *GEMA I*, decision 71/224/EEC of the European Commission of 2 June 1971; *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome*, unreported case C-177/16; *CISAC v European Commission*, unreported case T-442/08; *Lucazeau* [1989] ECR 2811; *Tournier* [1989] ECR 2521; *Greenwich Film v SACEM* [1979] ECR 2811; *OSA v Lecebne Lazne* supra note 136.

<sup>139</sup> Towse and Handke op cit note 3.

<sup>140</sup> *Ibid.*

to point out that the prevailing view, with which this writer concurs, is that government regulation of collective management is not only necessary but also inevitable given the nature of the collective management and licensing markets, which defines the relationship between CMOs and copyright owners, the relationship between CMOs and users of the copyright works, and the relationship between CMOs. Moreover, the public nature of the services rendered by CMOs, which are largely private entities, makes governmental oversight important in the public interest.<sup>141</sup> By common knowledge, the main objective of regulating collective management is to ensure efficiency, transparency and accountability. The specific concerns addressed by competition law in reaching this objective has been highlighted in 2.4.3 above. It remains now to mention that copyright sector-specific regulatory framework generally provides for issues relating to CMO's legal form, structure and internal governance, conditions for CMO membership by copyright owners, royalty distribution, and licensing, royalty and tariff setting between CMOs and users. Other issues generally covered by copyright sector-specific regulations include dispute resolution mechanisms, among others.<sup>142</sup> These issues are further discussed within the context of the Nigerian and South African copyright sector-specific regulations in chapters three and four below.

Given their emergence as vehicles for the ease of the copyright licensing and enforcement problems, CMOs were initially regarded as subjects of copyright law. However, they eventually came under competition law scrutiny upon realization of the propensity to be anticompetitive within the copyright market. Thus, it is not unusual to find countries that subject CMOs to scrutiny either under copyright sector-specific regulatory regime or under both copyright and competition regimes.

For countries adopting copyright sector-specific regulation, the observed trend is that while some make all the provisions relating to collective management under the general copyright law,<sup>143</sup> some others make a few provisions in the copyright law and empower a political office holder or a supervisory body to make rules for the regulation.<sup>144</sup> Also, some enact a separate law entirely for regulation of collective

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<sup>141</sup> A Adewopo *Nigerian Copyright System: Principles and Perspectives* (2012) 88-89.

<sup>142</sup> Generally, see W Liu 'Models for collective management of copyright from an international perspective: potential changes for enhancing performance' (2012) 17 *JIPR* 46-54.

<sup>143</sup> The Consolidated Act on Copyright, Consolidated Act No.1144, 2014 (Denmark).

<sup>144</sup> Nigeria and South Africa are examples of countries with such arrangements under the Nigerian Copyright Act, s39 and SA Copyright Act, s9A respectively.

management.<sup>145</sup> In all these cases, the supervision of collective management is placed under the powers of a political office holder, a supervisory agency or a judicial or quasi-judicial (special tribunal) body depending on the relevant national law.<sup>146</sup> As shown in chapters three and four respectively, Nigeria and South Africa are examples of countries where CMOs are supervised under copyright sector-specific regulations.

From the discussion in 2.2 above, it is apparent that the US forms an interesting example of a country where both competition and copyright law are applied in regulating CMOs. First, the main CMOs, ASCAP and BMI, which are classified as exclusive rights (performing rights) CMOs are regulated under consent decrees informed by US antitrust (competition) law. The consent decrees are administered by a dedicated royalty rate judge as determined under the US Musical Works Modernisation Act, 2018. The Musical Works Modernisation Act also provides for an extensive regulatory framework for CMOs established for the collection and distribution of royalties collected in respect of remuneration (mechanical) rights in relation to musical downloads and interactive streaming. The EU is another example of a jurisdiction where CMOs are subject to regulation under copyright sector-specific regulation and competition law. The Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014 (CRM Directive) is relevant here. The CRM Directive is a codification of the CJEU CMO-related competition principles established over four decades under art. 101 and 102 of the Treaty for the Functioning of the European Union (TFEU). It is also informed by EU copyright law. Nonetheless, the CJEU still scrutinizes CMOs in EU member countries under framework of art.101 and 102 of the TFEU.

The fact that CMOs are ordinarily constructs of copyright law raises question as to the appropriateness of applying competition law for their regulation. In other words, should competition law be applied to CMOs as substitute to copyright law and vice versa or should both copyright and competition be applied complementarily? Such

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<sup>145</sup> Germany and Netherlands are examples of countries with a separate law for collective management. See Law on the Administration of Copyright and Neighbouring Rights, 1995 as amended (Germany); Act on the Supervision of Collective Management Organizations for Copyright and Related Rights, 2003 as amended (Netherlands).

<sup>146</sup> L Guibault and S van Gompel 'Collective management in the European Union' in D Gervais op cit note 51 at 135-168.



question is usually considered against the backdrop of the sector-specific regulation (or regulated industry) defence to competition law oversight,<sup>147</sup> and it gives rise to the need to consider the strengths and weaknesses of applying competition law within a sector-specific domain such as collective management. These issues will be better appreciated within the context of the copyright and competition law interface discussed in 5.2 below.

For now, it is important to note that copyright sector-specific regulatory frameworks appear more effective in regulating CMOs mainly because the whole idea of collective management emerged to effectuate copyright as defined by copyright law. As such, the systems of control, procedures for redress and available remedies under copyright sector-specific regulations may be more suited to address CMO's overreach and to promote efficiency in the relevant copyright management and licensing markets. However, law enforcers under copyright sector-specific regulations may usually not be equipped to tackle issues relating to the elimination of competition within the copyright management and licensing markets arising from CMOs dominant behaviour. In such situation, resort to competition law becomes important. Competition law is generally crafted to address monopolies and dominant behaviours that limit competition, and lead to inefficiencies, in a given market. Market definition is an important trigger to the application of competition with the effect that for competition law to intervene, the specific conduct complained against must be situated within a defined market. On the other hand, the application of copyright law does not require market definition. The important question is whether copyright exists in the work that is the subject matter of a legal action. Thus, while competition law is more suited to address concerns arising

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<sup>147</sup> For a general Discussion on the sector-specific regulation defense under competition law and related issues, see P Congedo 'The "regulatory authority dixit" defence in European competition law enforcement' (2014) MPRA Paper No. 60239 available at [https://mpra.ub.uni-muenchen.de/60239/1/MPRA\\_paper\\_60239.pdf](https://mpra.ub.uni-muenchen.de/60239/1/MPRA_paper_60239.pdf), accessed on 1 March 2019; RD Nair et al 'The inter-relationships between regulation and competition enforcement in the South African liquid fuels industry' (2015) 26(1) *Journal of Energy in Southern Africa* 11-19; A de Streel 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' (2008) available at <https://pdfs.semanticscholar.org/2d16/db27d8d021ff051e653cfd039549664b8453.pdf>, accessed on 1 March 2019; M Hellwig 'Competition Policy and Sector-Specific Regulation for Network Industries' (2008) available at <https://pdfs.semanticscholar.org/b0ae/a9587db5efbcbd8b21ba5aeb3b6bc67a82f6.pdf>, accessed on 1 March 2019.

from abuse of dominance by CMOs in a given market, copyright law is suitable for copyright infringement claims, among others.

Within the context of collective management, resort to competition legal frameworks may be challenged on the ground that the CMO's conduct being complained about is sanctioned by copyright sector-specific regulation. However, the extent to which, and the conditions upon which, the sector-specific regulation defence can be relied upon by a CMOs under the Nigerian and South African competition legislation is examined in chapter five below. Even where such defence is sustained, it does not obviate the anticompetitive effects the impugned conduct of the CMO will have on the collective management and licensing market. Thus, it is important for copyright sector-specific regulations for CMOs to be framed in a manner as to vest legal authority on the relevant copyright regulatory body to address the competition concerns of CMOs. In the absence of such rules, competition law intervention becomes inevitable.

To pre-empt the discussion in chapter five, it deserves mention that the Nigeria and South competition legislations apply to all economic activities in both countries unless where a particular economic sector is exempted, excluded or excepted from the ambit of the legislations.<sup>148</sup> Thus, the competition legislations are applicable in principle to CMOs. But, this thesis aims to determine whether the competition legislations in both countries need be applied to CMOs in practice. To resolve this question, it is important to first examine the existing copyright-sector specific regulations to determine if they empower the relevant copyright regulatory bodies to address the specific CMOs' competition concerns highlighted in 2.4.3 above.

## **2.6 Conclusion**

The key functions of CMOs are the monitoring of uses of copyright works; the negotiation of royalties with users of copyright works on the basis of agreed tariffs; the issuance of licenses; collection of royalties; distribution of royalties among copyright owners; and in deserving cases, the enforcement of copyright. These functions are regarded as CMOs legal and economic functions. Apart from these, CMOs also carry

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<sup>148</sup> Nigerian Competition Act, ss68, 104 to 106; South African Competition Act, ss3(1A), 10, 21(1)(h) and 82.

out other socio-cultural functions aimed at promoting cultural creativity and social welfare within the collective management and licensing markets. In this regard, CMOs serve as a bridge between copyright owners and copyright users to ensure access to copyright works for users and reward for copyright owners, and thereby help in solving the problem of transaction cost which copyright owners and users will ordinarily face in the copyright market.

The capacity of CMOs to solve the transaction cost problem by deploying economics of scale and scope and their ability to promote creativity and social welfare makes them very relevant despite the development of digital technology and its impact on copyright licensing. From competition law perspective, CMOs have been very important means of commercialising copyright and achieving the creativity promotion goals of copyright law. As such, the approach of competition courts has been to preserve CMO's monopoly while subjecting its exercise within the collective management and licensing markets to competition law oversight by addressing specific competition concerns identified in 2.4.3 above. Copyright law makers also recognise the importance of collective management within the copyright legal framework and the tendency for CMOs to overreach copyright owners and users if not subject to regulatory oversight. Thus, sector-specific regulatory regimes set out general and specific acceptable conducts for CMOs as highlighted in 2.5 above.

Generally, the aim of regulating CMOs is to ensure efficiency, transparency and accountability in collective management. In achieving this aim, copyright and competition law may either be applied as substitute to each other or as complementary regulatory regimes. However, the fact that collective management is a copyright construct and enabled by copyright law can be raised as defence to competition law oversight of a CMO's anti-competitive conduct. Such defence would not arise if the impugned conduct of the CMO is being scrutinised under copyright sector-specific regime. But such regime will have to confer legal authority on the relevant copyright regulatory body to address CMO competition concerns. The next two chapters are structured to examine the copyright sector-specific regulatory frameworks for CMOs in Nigeria and South Africa respectively with the aim of determining whether they empower the relevant copyright enforcement bodies to address the competition concerns highlighted in 2.4.3 above.

## **CHAPTER THREE: REGULATION OF COLLECTIVE MANAGEMENT ORGANISATIONS IN NIGERIA**

### **3.1 Introduction**

The research objective has been clearly stated in the previous chapters. This chapter focuses on the regulatory framework for CMOs in Nigeria. The Nigerian Copyright Act and CMO Regulations are the principal regulatory framework for CMOs in Nigeria. Also, CMOs fall under the corporate governance rules in the Company and Allied Matters Act (CAMA)<sup>1</sup> especially as it relates to issues of company formation, corporate governance and winding up. The aim of this chapter is to determine if the regulatory concerns highlighted in the previous chapter are captured in the Nigerian regulatory framework. Discussion in this chapter will help to determine if the regulatory framework empowers the copyright regulatory body to address the CMOs' competition concerns highlighted in chapter 2 above, but discussed in chapter five below.

### **3.2 Emergence of collective management in Nigeria**

The origin of collective management in Nigeria, like other former British colonies, is linked to Britain.<sup>2</sup> The British Copyright Act, 1911 was made applicable in the colonies.<sup>3</sup> The Act preceded the establishment of the Performing Rights Society (PRS) in Britain in 1914. By virtue of the existing legal environment, the operation of PRS extended to the colonies, Nigeria inclusive.<sup>4</sup>

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<sup>1</sup> CAP C20, Laws of the Federation of Nigeria, 2004. It should be noted that CAMA is currently under review. The Senate (upper legislative chamber of the National Assembly in Nigeria) recently passed the Company and Allied Matters Act (Repeal and Re-enactment) Bill, SBs 355 and 384, 2018 (Hereafter, CAMA Amendment Bill). A similar Bill before the House of Representatives is being awaited before a harmonised Bill will be forwarded to the President for enactment: PLAC 'Senate passes the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018' (15 May 2018) available at <http://placng.org/wp/2018/05/senate-passes-the-companies-and-allied-matters-act-repeal-and-re-enactment-bill-2018/>, accessed 16 May 2018.

<sup>2</sup> JJ Baloyi and T Pistorius 'Collective Management in Africa' in D Gervais (ed.) 3rd ed. *Collective Management of Copyright and Related Rights* (2015) 369-424, 397.

<sup>3</sup> Copyright Act, 1911 [1 & 2 Geo. 5. Ch. 46], ss25-28.

<sup>4</sup> A Adewopo 'Legal Recognition of Collecting Societies under the Copyright (Amendment) Act 1992' in MA Ikhariala (ed.) *LASU Law and Development* (1996) 86.

This continued until Nigeria gained independence from Britain in 1960. Consequently, PRS' operation in Nigeria ceased until 1974 when it entered into an agency arrangement with a Law firm, Giwa & Atilade and Co.<sup>5</sup> The law firm was mandated 'to get Nigerian composers to join PRS and to commence licencing and collecting of royalties from Nigerian users' on behalf of PRS.<sup>6</sup> So, the first indigenous CMO in Nigeria was an agency type CMO. The promulgation of the first Nigerian copyright law in 1970 was another reason for the agency arrangement.<sup>7</sup>

The agency arrangement prevailed in Nigeria until 1986 when it was terminated.<sup>8</sup> This followed the establishment of the first full-fledged indigenous CMO, Musical Copyright Society Nigeria (MCSN), in 1984 and reciprocal agreements between it and PRS wherein it acquired the assets and liabilities of PRS in Nigeria.<sup>9</sup> The agency arrangement, which preceded MCSN, succeeded in securing mandates of notable Nigerian copyright owners for PRS. But it had challenges on the user side for some reasons including the level of awareness and the lack of trust for a foreign company. MCSN faced similar challenges even though it recorded some strides in both the copyright owners and users market.<sup>10</sup>

MCSN's operations were unregulated even after the promulgation of the Nigerian Copyright Act in 1988.<sup>11</sup> Its operation came under regulation after the first amendment to the Nigerian Copyright Act in 1992<sup>12</sup> and the passage of the Copyright (Collecting Societies) Regulation, 1993 (1993 Regulation) when prior approval for operation as a CMO became compulsory in Nigeria.<sup>13</sup> MCSN's application for approval was refused on the ground of its 'refusal to furnish the NCC all relevant information'.<sup>14</sup> The refusal was hinged on the belief that MCSN was not a truly nationalistic CMO because of the huge control PRS had over it.<sup>15</sup>

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<sup>5</sup>OA Olatunji, et al 'Collective management of rights in musical works and sound recordings: a critique of the Copyright Society of Nigeria' (2017) *IIC* 1-26.

<sup>6</sup> JO Odion and DO Oriakhogba 'Copyright collective management organizations in Nigeria: Resolving the *locus standi* conundrum' (2015) 10(7) *JIPLP* 518-525.

<sup>7</sup> A Adewopo *Nigerian Copyright System: Principles and Perspectives* (2012) 86-88.

<sup>8</sup> Ibid.

<sup>9</sup> O Ola *Copyright Collective Administration in Nigeria: Lessons for Africa* (2013) 17.

<sup>10</sup> Ibid.

<sup>11</sup> It was promulgated as Copyright Decree, No 47 1988. Nigeria was under military rule at the time.

<sup>12</sup> Copyright (Amendment) Decree, No. 98 1992. The Decree introduced section 32B (now Nigerian Copyright Act, s39)

<sup>13</sup> Ola op cit note 9 at 29-38.

<sup>14</sup> Adewopo op cit note 7 at 87.

<sup>15</sup> Ibid at 103.

The Performing and Mechanical Rights Society (PMRS) was established in 1994 by local musical copyright owners to manage musical copyright.<sup>16</sup> It was approved under the then prevailing legal framework, thus, making it two CMOs in the music industry. Being the first CMO, MCSN had very robust repertoire with the knowhow and capacity for collective management. Its major setback was the lack of approval. On the other hand, PMRS lacked the required repertoire and managing capacity to attract necessary patronage and cooperation.<sup>17</sup> This situation continued until sometime in 2005 when the NCC approved MCSN to operate alongside PMRS.<sup>18</sup>

Consequently, collective management in the Nigerian music industry became embroiled in crisis, the dialectics and dynamics of which have been copiously recorded elsewhere.<sup>19</sup> The crisis led to further reform of the regulatory framework resulting in the enactment of the CMO Regulations in 2007. This also led to the establishment of the Copyright Society of Nigeria (COSON) with its approval in 2010 as the sole CMO in the music industry.<sup>20</sup> Once again, MCSN was unapproved and the crisis continued. The crisis attracted the attention of the Nigerian House of Representatives (HofR). The HofR Committee on Justice and Judiciary investigated NCC's refusal to approve MCSN leading to the adoption of certain resolutions by the HofR, discussed later.<sup>21</sup> The resolutions gave impetus for the Ministerial directive to NCC for the immediate approval of MCSN in April 2017.<sup>22</sup> Following internal conflicts, brief account of which is highlighted below, COSON's approval was recently suspended by the NCC.<sup>23</sup>

The emergence of CMOs in Nigeria is not peculiar to the Music industry alone. The Reprographic Rights Society of Nigeria (REPRONIG) was established and approved in 2001 as the sole CMO in the print/publishing and visual arts industries in Nigeria.<sup>24</sup> On its part, the Audio Visual Rights Society of Nigeria (AVRS) was

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<sup>16</sup> Ola op cit note 9.

<sup>17</sup> Ibid at 19.

<sup>18</sup> Adewopo op cit note 4 at 105.

<sup>19</sup> Ibid at 86-115.

<sup>20</sup> Ola op cit note 9 at 20.

<sup>21</sup> HofR votes and proceedings of 18 December 2013, No. 48, 884-885. The HofR is the lower chamber of the Nigerian National Assembly. The Senate is the upper chamber.

<sup>22</sup> Letter of the Minister of Justice and Attorney General of the Federation (MoJ/AGF) to the Director General of NCC, N.I.149/1, 22 March 2017 (in file with author).

<sup>23</sup> NCC's Letter to the General Manager, COSON dated 30 April 2018 (in file with author).

<sup>24</sup> Ola op cit note 20.

established to cater for copyright management in the audio-visual industry. It was approved in 2014 as the sole CMO in that industry.<sup>25</sup>

Nigeria now has four CMOs: REPRONIG and AVRS for the print/publishing and visual arts industries, and audio-visual industry respectively. MCSN and COSON (approval suspended) for the music industry. Interestingly, both MCSN's and COSON's respective repertoire include similar category of copyright for the same classes of copyright owners. Consequently, they will concurrently be representing composers, publishers, performers and owners of sound recordings in Nigeria.

### 3.3 Legislative history of the regulation of CMOs in Nigeria

It is important to briefly set out the legislative history of the regulatory framework for CMOs in Nigeria. This will aid proper understanding of the case law to be examined in the course of this chapter.

Historically, the defunct Copyright Decree of 1970<sup>26</sup> (the 1970 Decree) was the first regulatory framework for CMOs in Nigeria. Section 13 of the 1970 Decree empowered the then Federal Commissioner of Trade to appoint three persons as a competent authority to regulate the licensing practices of a licensing body (CMO).<sup>27</sup> The competent authority was empowered to stipulate royalties and other terms and conditions upon which to grant compulsory licenses. It was to exercise this power where it appeared to it that a CMO was unreasonably refusing to grant, or imposing unreasonable terms and conditions for the grant, of licenses for copyright works.<sup>28</sup> The competent authority's decision was subject of appeal to the commissioner,<sup>29</sup> who was

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<sup>25</sup> AVRS available at <http://www.avrsnigeria.com/?q=page/audio-visual-rights-society-nigeria>, accessed on 7 March 2017.

<sup>26</sup> Decree No 61 1970.

<sup>27</sup> Ibid ss13(1) and (3) and 19. The Minister of Trade and Industry is the equivalent of this position presently. However, copyright administration in Nigeria is currently superintended by the MoJ/AGF. This seems contrary to the Nigerian Copyright Act, s51 where the term 'Minister' is defined to mean the Minister charged with the responsibility for culture in Nigeria. But the present arrangement has been held by the FHC to be lawful in view of section 148(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN). That section empowers the President, in his discretion, to assign responsibility for any business of the government of the federation, including the administration of any department of government to the Vice-President or any Minister of the federation. The reasoning is that the CFRN supersedes any legislation in Nigeria and in the face of conflict the provision of the CFRN prevails: *PMRS v NCC*, unreported Suit No. FHC/L/CS/61/2007 (4 June 2009); *COSON v MCSN & Ors*, unreported Suit No.: FHC/L/CS/1259/2017, 32-34 (13 February 2018); JO Asein *Nigerian Copyright Law and Practice* (2012) 352.

<sup>28</sup> Section 13(3).

<sup>29</sup> Section 13(4).

empowered to make regulations providing procedural rules for the competent authority.<sup>30</sup>

The competent authority was to be an ad hoc arrangement to consider complaints relating to licensing practices of CMOs. The provisions were never activated probably because there were no complaints. Thus, the assertion above that MCSN's operations were unregulated during this period is not unfounded. It could also be said that the competent authority was the precursor to the Nigerian Copyright Commission (NCC), regarding regulation of CMOs, and not the Nigerian Copyright Council (the Council) created under the Nigerian Copyright Act before the first amendment.<sup>31</sup> This is because the competent authority had some supervisory powers under the 1970 Decree specific to CMOs, while the Council had none. However, the better view is that, under the 1970 Decree, the then Federal Ministry of Trade was responsible, through the commissioner, for the broad mandate similar to that of the NCC under the extant Nigerian Copyright Act<sup>32</sup> and as such should be regarded as the actual progenitor of the NCC.

Under the 1988 Decree (Nigerian Copyright Act before its first amendment), there was no provision for regulation of CMOs. But the draft Decree submitted to the then Federal military government proposed a s35 to regulate CMOs.<sup>33</sup> The 1988 Decree created the council mentioned above with mainly administrative powers over copyright in Nigeria. Most of the Council's activities were centred on public enlightenment campaigns and seminars on copyright.<sup>34</sup>

The non-regulatory environment ushered in by the 1988 Decree was corrected by an amendment decree in 1992 (1992 Decree).<sup>35</sup> The 1992 Decree created the NCC with its current broad powers<sup>36</sup> and introduced s32B (now s39 of the Nigerian Copyright Act) that formed the bedrock for the current regulatory framework for CMOs in Nigeria. The NCC made the 1993 Regulations pursuant to this section. The 1993

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<sup>30</sup> Section 13(5).

<sup>31</sup> 1970 Decree, ss30-32.

<sup>32</sup> Asein op cit note 27 at 351.

<sup>33</sup> T Okoroji Copyright *Neighbouring Rights and the ne Millionaires: The Twists and Turns in Nigeria* (2008) 195.

<sup>34</sup> OA Olatunji 'Copyright regulations under the Nigerian Copyright Act: a critical analysis' (2013) 2(1) *NJIP* 47-81.

<sup>35</sup> Supra note 12.

<sup>36</sup> CM Adewole, et al 'The management of copyright in the creative country industry in Nigeria: nollywood experience' 6 available at [http://umconference.um.edu.my/upload/43-1/papers/286%20Adelowo\\_Egbetokun\\_Oluy\\_Abolaji\\_Siyanbola.pdf](http://umconference.um.edu.my/upload/43-1/papers/286%20Adelowo_Egbetokun_Oluy_Abolaji_Siyanbola.pdf), accessed on 27 April 2017.



Regulations was repealed and replaced by the CMO Regulations in 2007. The 1988 Decree was further amended by a decree in 1999<sup>37</sup> (1999 Decree) to include s15A (now s17 – discussed later). The Nigerian Copyright Act is a product of the 1988 Decree as amended in 1992 and 1999.

### 3.4 Agencies regulating CMOs in Nigeria

The NCC is the main agency regulating CMOs in Nigeria. It will be the focus of discussion in this part. But it should be mentioned briefly that the Corporate Affairs Commission (CAC) established under CAMA,<sup>38</sup> with its composition and roles spelt out therein,<sup>39</sup> generally administers and implements the provisions of CAMA. Its roles regarding CMOs fall within its broad mandate, which includes formation of companies, corporate governance issues, winding-up, among others.

The NCC is established under the Nigerian Copyright Act as a body corporate with the right to sue and be sued in its corporate name, among others.<sup>40</sup> The Nigerian Copyright Act also provides for the composition<sup>41</sup> and general function of the NCC.<sup>42</sup> Specifically, the NCC regulates CMOs in Nigeria,<sup>43</sup> and where expedient, it may assist in the establishment of a CMO for any class of copyright owners.<sup>44</sup> In this regard, The NCC's policy initiatives are aimed, among others, at promoting effective rights management by proper regulation and organisation of collective management in Nigeria.<sup>45</sup>

The NCC's policy focus, which shapes its supervision of CMO, includes: encouraging the establishment of strong and credible national CMOs reflecting the aspirations and expectations of Nigerian copyright owners; encouraging the formation of CMOs for different categories of copyright works or class of rights; providing technical support for effective management of rights by approved CMOs; engendering

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<sup>37</sup> Copyright (Amendment) Decree, No. 42 1999.

<sup>38</sup> CAMA, s1.

<sup>39</sup> CAMA, ss2 and 7.

<sup>40</sup> Nigerian Copyright Act, s34.

<sup>41</sup> Nigerian Copyright Act, s35.

<sup>42</sup> Ibid.

<sup>43</sup> Nigerian Copyright Act, s39(7)

<sup>44</sup> Nigerian Copyright Act, s39(9).

<sup>45</sup> NCC 'Programmes, Achievements and Challenges in 2016' (2016) available at [http://www.copyright.gov.ng/index.php/reports-services/item/download/18\\_0b4f48cb9e2743016bd4389233aa3674](http://www.copyright.gov.ng/index.php/reports-services/item/download/18_0b4f48cb9e2743016bd4389233aa3674), accessed on 9 June 2017

transparency and accountability in the management of CMOs' affairs; ensuring proper balancing of the interest of copyright owners and users; and ensuring a conducive and rancour-free licensing environment for approved CMOs.<sup>46</sup>

The NCC played a key role in the establishment of REPRONIG, COSON and AVRS. The NCC also carries out activities aimed at ensuring compliance with the Nigerian Copyright Act and the CMO Regulations by CMOs. Such activities include unscheduled assessment of CMOs and workshops on collective management. It has ensured the coming into effect of the Dispute Resolution Panel (DRP) envisaged in the CMO Regulations.<sup>47</sup> The NCC recently intervened in the ongoing internal crisis (briefly highlighted shortly) in COSON and was very vehement in ensuring that MCSN did not carry out the tasks of a CMO following its initial refusal to grant approval to MCSN. The NCC did this through arrests of MCSN's principal officers, raids and seizures of alleged copyright infringing documents, and criminal prosecution of principal officers of the MCSN and other administrative and enforcement actions.<sup>48</sup>

Such raids, seizures and arrest exercises of the NCC led the MCSN and its principal officers to institute a human right enforcement suit.<sup>49</sup> In the suit, the MCSN claimed declaratory, injunctive (interdict) and compensatory reliefs against the NCC. After declaring the arrests and seizures as 'arbitrary and heavy handed',<sup>50</sup> the court, per Archibong J (as he then was), stated:

The [NCC] was established to reinforce the rights of copyright owners, assignees and licensees; not to be an institutional hurdle with arbitrary power to restrict the private enjoyment and enforcement of such rights. Copyright owners do not exist at the pleasure of the [NCC]; or merely to validate its establishment. And most definitely the [NCC] was not established to undermine, denigrate or exact obeisance from copyright owners'.<sup>51</sup>

The above admonition reflects the need for the NCC to be cautious in the discharge of its functions in order not to abuse its powers under the Nigerian Copyright Act. The judgment declared the MCSN (then unapproved by NCC) as owner, assignee and exclusive licensee of copyright for the purpose of instituting the action. This aspect of the judgment appears to fly against the provision of s17 of the Nigerian Copyright

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<sup>46</sup> O Ezeilo 'Overview of the publishing industry and legal basis for collective management in Nigeria' (2013) 16 available at [http://www.ifrro.org/sites/default/files/2\\_Ezeilo.pptx](http://www.ifrro.org/sites/default/files/2_Ezeilo.pptx), accessed on 9 June 2017.

<sup>47</sup> NCC op cit note 45.

<sup>48</sup> Ibid.

<sup>49</sup> *MCSN v NCC*, unreported Suit NO. FHC/L/CS/35/2008 (25 July 2011).

<sup>50</sup> Ibid 15.

<sup>51</sup> Ibid 18.

Act. However, differing judicial pronouncements on the implication of that section existed in the Court of Appeal,<sup>52</sup> until very recent intervention by the Supreme Court.<sup>53</sup> The provisions of s17 will be examined in due course. It suffices now to state that Archibong J's judgment seems to highlight a salient issue: whether an unapproved CMO is absolutely barred from access to the court insofar as the cause of action is outside the provisions of the Nigerian Copyright Act? This issue will be addressed shortly. There is a pending appeal against the judgment.<sup>54</sup> But in view of the recent Ministerial directive for the approval of MCSN, it is doubtful whether the NCC will still pursue the appeal.<sup>55</sup>

In a similar human rights enforcement action, the FHC – through Yunusa J – held its earlier position and stated as follows:

‘the [Copyright Act] has endowed the [NCC] with the burden of enforcing the provisions of the [Copyright Act]. However, [the NCC] also have the responsibility to carry out such burden with care and trust for the citizenry. The [NCC] must not get intoxicated by enormous powers made available to them by law for its own cause and in the benefit of its citizens.’<sup>56</sup>

The Court of Appeal recently upturned the judgment of Yunusa J.<sup>57</sup> The Court of Appeal found that under s38 of the Nigerian Copyright Act, the NCC's copyright inspectors do not need a search or arrest warrant to enter into premises; arrest persons they reasonably suspect to be infringing copyright; and seize any document or thing they reasonably believe to be infringing copyright.<sup>58</sup> The appellate court also held that having not been approved to operate as a CMO by the NCC, the respondents were operating illegally. As such, the NCC's copyright inspectors were right in law to have carried out the arrest and seizure without a search and arrest warrant.<sup>59</sup> Another factor that influenced the court's judgment was that the respondents were already standing trial and that the seizures were done to obtain evidence against them in the trial.<sup>60</sup> The

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<sup>52</sup> *PMRS v Skye Bank* (2017) LPELR-43198; *Compact Disc Tech. Ltd v MCSN* 53 NIPJD [CA. 2010] 787/2008.

<sup>53</sup> *MCSN v Compact Disc Technology Ltd & Ors.*, SC. 425/2010 (14 December 2018); *Adeokin Records v MCSN*, SC. 336/2008, Supreme Court (13 July 2018).

<sup>54</sup> *NCC v MCSN*, Suit No.: CA/L/925/11 before the Court of Appeal, Lagos Division. See <http://www.copyright.gov.ng/index.php/court-cases/court-cases-pending>, accessed on 27 April 2017.

<sup>55</sup> Among other things, the directive instructed NCC to withdraw all pending suits against the MCSN.

<sup>56</sup> *MCSN v NCC* 56 NIPJD [FHC. 2013] 1163/2012.

<sup>57</sup> *NCC v MCSN*, unreported Appeal No.: CA/L/350/2013 (19 December 2016).

<sup>58</sup> *Ibid* at 12.

<sup>59</sup> *Ibid* at 19-21.

<sup>60</sup> *Ibid* at 13.

propriety of the Court of Appeal's judgment on the power of copyright inspectors under the Nigerian Copyright Act is beyond the scope of this work.

However, the judicial authority seems to give the impression that the NCC's regulatory power, particularly as it relates to approval or non-approval of CMOs, is an unquestionable exercise of administrative discretion. Specifically, the judgment of the FHC, per Ajakaiye J, in the case of *PMRS v NCC*<sup>61</sup> gives credence to this perception. The background to the case is that the defunct PMRS made an application for renewal of its license to operate as a CMO. The NCC refused the application. The application was made under the defunct 1993 Regulation. This was at a time when NCC and stakeholders in the music industry were trying to harmonise the operations of MCSN and the defunct PMRS as a way of resolving the existing crisis. The NCC refused the renewal to allow a smooth harmonisation process. The PMRS approached the court by way of judicial review of administrative action seeking an order of *certiorari* to quash the decision of the NCC refusing renewal and an order of *mandamus* compelling the NCC to grant it renewal.

The FHC declined the reliefs sought by PMRS. On the issue of *certiorari*, the judge reasoned that since the action of the NCC complained against by PMRS was purely administrative and not judicial or quasi-judicial, the prayer for *certiorari* could not be sustained. The judge drew a distinction between purely administrative actions and judicial or quasi-judicial actions against which an order of *certiorari* may be issued.<sup>62</sup> On the prayer for *mandamus*, the judge set out the conditions for the grant of *mandamus*. One of such grounds is that the order will not be granted if the action of the public authority complained against is an exercise of discretion. The judge held that NCC's approval is an exercise of discretion and as such, the order of *mandamus* could not be issued.<sup>63</sup>

The FHC, per Buba J, recently held similar position in *COSON v MCSN & Ors.*<sup>64</sup> The facts of the case will be highlighted in a later part of this chapter. For now, it should be noted that the FHC's position related to the issue of whether, in exercising its discretion to approve another CMO for a class of copyright owners under s39(3) of the Nigerian Copyright Act (examined later), the NCC must hear from the existing

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<sup>61</sup> Supra note 27.

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Supra note 27.

approved CMO? Holding that the NCC does not need to hear from existing CMOs before approving another CMO for the same class of copyright under s39(3), the FHC described the NCC's discretion in this regard as 'an absolute discretion.'<sup>65</sup>

It is doubtful if the position taken by Ajakaiye J in *PMRS v NCC* supra (and the description of NCC's discretion as absolute by Buba J above) would stand proper appellate review. The authorities seemed to have moved away from the anachronistic differentiation between administrative and judicial or quasi-judicial actions for the grant of *certiorari*. The emphasis in such applications is whether the public authority's decision affects the rights of the applicant and if so, whether the public authority acted beyond its powers or did not follow laid down procedure in coming to its decision.<sup>66</sup> Secondly, it is not appropriate for the court to simply refuse the order of *mandamus* on the ground that the refusal of NCC to grant the renewal was an exercise of discretion. Granted, courts are, and should be, wary to interfere with the exercise of administrative discretion.<sup>67</sup> But in deserving cases, the court may need to subject the exercise of administrative discretion to some judicial test to ensure that the discretion is not exercised arbitrarily and unreasonably.<sup>68</sup> The courts will inquire whether the discretion was exercised in good faith; whether the public authority allowed the exercise of discretion to be fettered in anyway; whether the public authority made relevant considerations when exercising the discretion; whether the exercise of discretion is not unreasonable; whether the authority acted according to laid down rules; and whether it considered all available facts before making its decision.<sup>69</sup>

A detailed discussion of the above test is beyond the scope of this work.<sup>70</sup> It suffices to state that where the exercise of administrative discretion failed the test, the court may hold that the discretion was not exercised at all and may direct the public

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<sup>65</sup> Ibid at 35.

<sup>66</sup> *Board of Education v Rice* [1911] AC 179.

<sup>67</sup> CH Koch 'Judicial review of administrative action' (1986) 54(4) *The George Washington Law Review* 469-511. See, *Military Governor, Imo State v. Nwauwa* (1997) 2 NWLR Pt490 675 @ 697 Ogundare, JSC (Justice of the Supreme Court) laid the following guiding principles for judges reviewing administrative actions: (a) judicial review is not an appeal; (b) the court must not substitute its judgment for that of the public body whose decision is being reviewed; (c) the correct focus is not upon the decision but the manner in which it was reached; (d) what matters is the legality and not the correctness of the decision and (e) the reviewing court is not concerned with the merits of the target activity.

<sup>68</sup> Koch Ibid; DW Davids 'Law and administrative discretion' (1994) 2(1) *IJGLS* 191-206.

<sup>69</sup> See *APPH Ltd v Wednesbury* [1948] 1 KB 224; *Pepcor Retirement Fund v FSB* [2003] 3 All SA 21 (SCA).

<sup>70</sup> HWR Wade and CF Forsyth *Administrative Law* 9th (2004) 343-429.

authority to exercise its discretion according to the enabling law.<sup>71</sup> The point being made so far is that the NCC's discretion in the regulation of CMOs is not absolute and unquestionable. In deserving cases, the court may investigate the exercise of discretion to ensure that the NCC did not act arbitrarily and unreasonably.

Section 50 of the Nigerian Copyright Act further buttresses the argument that the NCC's exercise of discretion is not absolute. The section subjects the NCC's powers to Ministerial directives. In carrying out its functions, the NCC is under a duty to comply with any directive from the Minister relating to the performance of its roles under the Nigerian Copyright Act. The exercise of the power by the Minister of Justice/Attorney General of the Federation (MoJ/AGF) came under attack recently in *COSON v MCSN* supra. Following the MoJ/AGF's directive leading to the approval of MCSN by the NCC, COSON initiated a suit seeking, among others to void the directive and the consequent approval of MCSN. It contends that the MoJ/AGF is not the Minister envisaged under s51 of the Nigerian Copyright Act and as such lacked the competence to issue the directive. In effect, the approval of the MCSN based on it is void. The FHC rejected COSON's contention. It held that the MoJ/AGF validly issued the directive having been designated by the President to oversee copyright regulation in Nigeria.<sup>72</sup> The FHC also held that compliance by the NCC with the directive under s50 of the Nigerian Copyright Act is mandatory.<sup>73</sup> However, the Ministerial power over the NCC is overly broad and susceptible to abuse. It is capable of derailing the NCC in the exercise of its functions and throwing the copyright-based industry into chaos. As such, it should be exercised sparingly and on sound judgment of copyright law and policy.

### 3.5 Regulation of CMOs

The relevant sections of the Nigerian Copyright Act and CMO Regulations are examined in this part. Relevant sections of CAMA touching on CMOs will also be examined. It is observed that while the Nigerian Copyright Act uses the term 'collecting societies', the CMO Regulations adopts the term 'Collective Management Organisations' (CMOs). The different terms used are neither confusing nor conflicting.

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<sup>71</sup> P Ghosh 'Judicial review of administrative discretion in India – essay' available at <http://www.shareyouressays.com/120560/judicial-review-of-administrative-discretion-in-india-essay>, accessed on 28 April 2017.

<sup>72</sup> Supra note 27.

<sup>73</sup> Ibid at 33.

Both terms mean the same thing. They refer to associations of copyright owners, or other organisations, involved in complete, partial or agency type collective management.<sup>74</sup> The term “collecting societies” have been referred to severally as copyright collective societies, collective rights management organisations, among others.<sup>75</sup> The CMO Regulations also defines Collective Management Organisations as collecting societies defined under the Nigerian Copyright Act.<sup>76</sup> Even so, there are plans to achieve consistency in terminology between the Nigerian Copyright Act and the CMO Regulations.<sup>77</sup> As seen from the discussion so far, this thesis adopts the more widely used term “CMO”. That being said, the goal under this head is to examine the specific rules contained in the Nigeria copyright sector-specific regulation so as to lay the necessary foundation for the resolution of the research questions in chapter five.

### 3.5.1 Approval to operate as a CMO

In terms of s39(1) of the Nigerian Copyright Act, a CMO ‘may apply’ to the NCC for approval. The application should be made in the form prescribed in the Schedule to the CMO Regulations and on payment of the prescribed fee.<sup>78</sup> Failure to obtain approval before operating as a CMO is an offence.<sup>79</sup> Despite the use of the term ‘may apply’, the approval requirement under s39 is mandatory.<sup>80</sup> The approval requirement has not been without some challenge. The challenge rests on three planks,<sup>81</sup> considered in the following discussion.

#### 3.5.1.1 Copyright exclusivity and no-formality argument

It has been contended that

‘section [39] constitutes a barrier [...] as it fetters the freedom of right owners to determine the economic conditions for the exploitation of their works. It is also at variance with the exclusive right of control [...] The Berne Convention [...] provides that “the enjoyment and exercise of the rights therein guaranteed shall not be subject to any formality”, an injunction from which section [39] would appear to derogate’.<sup>82</sup>

<sup>74</sup> OS Opadere ‘Complexities of Copyright Collective Management in Nigeria Vis-à-vis the Desire for Economic Development’ in E Azinge and H Chuma-Okoro (eds.) *Intellectual Property and Development: Perspectives of African Countries* (2013) 287-316.

<sup>75</sup> For instance, see R Hilty and S Nerisson ‘Collective Copyright Management and Digitization: The European Experience’ (2013) *MPIIPCL Research Paper No.13-09* 12.

<sup>76</sup> Regulation 22.

<sup>77</sup> Clause 74 Draft Copyright Bill.

<sup>78</sup> Regulation 1(1) and 18.

<sup>79</sup> Nigerian Copyright Act, s39(4), (5), and (6).

<sup>80</sup> *MCSN v Detail*, unreported Appeal No.: CA/L/506/1999 (28 May 2015).

<sup>81</sup> A Adewopo ‘Proposals for Liberalisation of Collecting Societies in Nigeria’ in J Asein and E Nwauche eds. *A Decade of Copyright Law in Nigeria* (2002) 143-151.

<sup>82</sup> *Ibid* at 149.

It is already over-flogged that the protection of the exclusive rights of authors forms the centrepiece of the Berne Convention, other international copyright treaty, and the Nigerian Copyright Act. Under the Berne Convention, national legislators have the liberty to subject the exercise of copyright exclusivity in special cases to certain conditions that must not conflict with the normal exploitation of their works or unreasonably prejudice their legitimate interest.<sup>83</sup> Further, national legislators are enjoined under the Berne Convention not to subject the enjoyment and exercise of exclusive rights to any formalities.<sup>84</sup>

The issue here will be whether the approval requirement is a condition or a formality. If it is a formality then it contravenes the minimum standards for protection of copyright under international norms and under the Nigerian Copyright Act. If it is a condition, however, the issue will be whether it unreasonably prejudices the legitimate interests of copyright owners.

The formality challenge was canvassed in the case of *MCSN v Details* (Details) before the Court of Appeal.<sup>85</sup> The case was an appeal from the FHC where it was held that the appellant lacked *locus standi* to initiate the action since the NCC did not approve it to operate as a CMO.<sup>86</sup> At the Court of Appeal, the appellant raised the issue of formality and contended that the approval requirement contravenes art.5(2) of the Berne Convention. The appellant contended that, apart from being a signatory, Nigeria has domesticated the Berne Convention and as such, art.5(2) should prevail over the approval requirement.<sup>87</sup> It should be noted that the appellant in this case did not explain how the approval requirement constitutes a formality. Sadly, in its judgment, the Court of Appeal did not address the issue of formality. Instead, it dwelled on the issue of domestication of the Berne Convention and held that the appellant did not establish that the Berne Convention has been domesticated and as such cannot override the Nigerian Copyright Act.<sup>88</sup>

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<sup>83</sup> Articles 9, 11bis 2 and 13(1).

<sup>84</sup> Article 5.

<sup>85</sup> Supra note 79.

<sup>86</sup> *MCSN v Detail* [1990] IPLR 260.

<sup>87</sup> Supra note 79 at 5.

<sup>88</sup> Ibid at 14.



The appellate court's position on the issue of domestication of the Berne Convention cannot be faulted.<sup>89</sup> However, by dwelling so much on the issue and failing to address the issue of formality, the Court of Appeal gives the impression that if the Berne Convention had been domesticated, the approval requirement in the Nigerian Copyright Act would have been held to contravene the no-formality principle. The position canvassed by the appellant seems based on a misconception of the no-formality requirement in art.5(2) Berne Convention. The no-formality principle simply means that member countries of the Berne Convention are not allowed to subject the genesis or existence of copyright in works to any formalities.<sup>90</sup> The protection of copyright is automatic upon creation of a work, so long as the work meets the originality and fixation requirements under the Nigerian Copyright Act.<sup>91</sup>

The approval requirement is aimed at bringing all CMOs in Nigeria within the regulation of the NCC.<sup>92</sup> It does not abrogate or hinder the formation of CMOs, neither does it preclude the protection of copyright owners' exclusive rights. It is not an abridgement or infringement of exclusive rights. It recognises exclusive rights and provides safety nets in exercising the rights through CMOs.<sup>93</sup> It does not contravene the relevant Berne Convention relating to the placing of conditions for the exercise of exclusive rights.<sup>94</sup>

### 3.5.1.2 *Human rights argument*

It has been contended that the approval requirement contravenes the human rights to freedom of association and to own property protected under the Constitution of the Federal Republic of Nigeria, 1999.<sup>95</sup> The view is that where the NCC refuses to approve a CMO, the rights of copyright owners to associate as a CMO and to individually own properties (movable property) are taken away.<sup>96</sup> Two FHC judgments seemed to

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<sup>89</sup> A treaty becomes enforceable in Nigeria when it is domesticated in Nigeria by an Act of the National Assembly. See CFRN, s12.

<sup>90</sup> SV Lewinski 'Mandatory collective administration of exclusive rights – a case study on its compatibility with international and EC copyright law' (2004) 1 *UNESCO e.Copyright Bulletin* 1-14.

<sup>91</sup> Nigerian Copyright Act, s1(2).

<sup>92</sup> Supra note 79 at 12.

<sup>93</sup> Ibid; *MCSN v CBS*, unreported Appeal No.: CA/L/576/2014 (29 December 2015).

<sup>94</sup> Adewopo op cit note 4 at 114.

<sup>95</sup> Sections 40, 43 and 44.

<sup>96</sup> Adewopo op cit note 81.

support this view.<sup>97</sup> But one of them has been upturned on appeal.<sup>98</sup> The prevailing view, as held in recent Court of Appeal cases, is that the approval requirement does not infringe on copyright owners constitutionally guaranteed human rights to freedom of association and to own property. In all these cases, the courts took the position that the approval requirement is meant to identify and bring CMOs within the regulation of the NCC.<sup>99</sup> In addition, the courts are of the correct view that the rights to freedom of association and to own property are not absolute rights. They are rights that can be limited by a law, such as s39, which is reasonably justifiable in a democratic society in order to promote public order, among others. With regards to the right to own properties, the prevailing view is that the approval requirement is not compulsory acquisition of property. Thus, it does not infringe the right to own property.<sup>100</sup>

The decision of the FHC in *MCSN v NCC*<sup>101</sup> is important on the issue of whether copyright may be regarded as moveable property under s44 of the Constitution. In that case, the MCSN initiated an action for the enforcement of human rights under the defunct Fundamental Rights (Enforcement Procedure) Rules, 1979 (FREP Rules). The MCSN sought, among others, a declaration that s39 is null and void as it seeks to abrogate copyright owners' rights to freedom of association and to own property. The FHC, per Sani J, refused the declaration and held that the section does not abrogate the fundamental rights complained about. In reaching this conclusion, Sani J took the view that the provision of the Constitution regarding the right to own moveable and immoveable properties does not include the right to own intellectual property (copyright). In other words, Sani J was of the view that copyright is not property envisaged under the Constitution.

Sadly, the Court of Appeal did not directly consider the issue of the nature of copyright as moveable or immoveable property raised by the main appeal. Instead, the appeal was decided on the Respondent's notice, which sought confirmation of Sani J's judgment on the ground, among others, that the FHC lacked jurisdiction since the case was not originally initiated through the right procedure. The respondent's contention is that the main claim of the appellant at the FHC was for a declaration that s39 is null

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<sup>97</sup> Supra notes 49 and 55. See also Archibong J remarks quoted in *Visafone v MCSN* (2013) 5 NWLR Pt 1347, 250 at 263.

<sup>98</sup> *NCC v MCSN* supra note 57.

<sup>99</sup> *MCSN v Detail* supra note 79; *MCSN v CBS* supra note 93; *Compact Disc v MCSN* supra note 52.

<sup>100</sup> Ibid.

<sup>101</sup> Unreported Appeal No.: CA/L/575/2009 (21 October 2016).

and void as being inconsistent with the Constitution and that such action cannot be validly initiated under the FREP Rules. The Court of Appeal upheld the respondent's contention and rightly held that,<sup>102</sup> under the defunct FREP Rules, it is the person whose human rights have been, is being or is likely to be infringed that can approach the court to enforce such rights. The right cannot be enforced on his/her behalf. However, the Court of Appeal appears to have made one declaration too many when it stated further that

‘[t]he appellant in his Motion on Notice stated that the applicant has a right as owner, assignee, and exclusive licensee of various authors and entities. This means that the appellant is not the owner of the copyright and therefore cannot sue for infringement on those rights [...].’<sup>103</sup>

The above pronouncement appears ambiguous. It seems to imply that CMOs, or other assignees and exclusive licensees cannot institute actions for the infringement of copyright. Overall, the judgment left the issue of the nature of copyright and its protection under the Constitution unanswered. Onyido *et al*, while attempting to explain the judgment, stated that

‘the transfer of rights to the [CMO] under current law although described generally as an assignment, is truly not intended as a complete and outright transfer of rights in the strict sense. It is more or less equivalent to a non-exclusive license, with the owners reserving the power to withdraw such rights at any time or to deal directly with third party users, if so desired’.<sup>104</sup>

The above position will be probed further shortly. For now, it should be stated that the position of Sani J on the nature of copyright and the right to own property, pointed out above, seems to conflict with established authorities. The Supreme Court of Nigeria has long declared copyright to be an incorporeal property,<sup>105</sup> which is a moveable property. This position was echoed by Asein who regarded copyright as falling within the category of moveable property known as *choses in action* because of its intangibility.<sup>106</sup> Again, Oyewunmi regarded copyright as proprietary rights.<sup>107</sup>

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<sup>102</sup> Ibid at 31.

<sup>103</sup> Ibid.

<sup>104</sup> J Onyido, et al ‘Who is a proper plaintiff in an action for the enforcement of copyright in Nigeria: a review of the Nigerian Court of Appeal in Musical Copyright Society Nig. Ltd v Nigerian Copyright Commission’ (2017) 4 available at <http://www.spaajibade.com/resources/wp-content/uploads/2017/01/Proper-Plaintiff-in-an-Action-for-the-Enforcement-of-Copyrights-in-Nigeria-Review-of-the-decision-in-Musical-Copyright-Society-of-Nigeria-Ltd-v.-Nigeria-Copyright-Commission.pdf>, accessed on 3 May 2017.

<sup>105</sup> *PPC Ltd v Adophy* [1977-1989] 2 IPLR 251-298 at 295-295.

<sup>106</sup> Asein op cit note 27 at 7.

<sup>107</sup> AO Oyewunmi *Nigerian Law of Intellectual Property* (2015) 22.

These views find legislative support in s11 of the Nigerian Copyright Act where copyright is regarded as moveable property. The protection afforded moveable property in the Constitution applies to both tangible and intangible properties. The Constitution does not differentiate between both. Section 44(1) of the Constitution provides that no ‘*moveable property* [...] shall be taken possession of or acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law [...]’ (emphasis added). Indeed, the Supreme Court not only recently reaffirmed its position on the nature of copyright as a property, it confirms it as falling under moveable properties protected under s44 of the Constitution.<sup>108</sup> It follows from the foregoing, that to exclude copyright from the ambit of moveable property protected under the Constitution would be turning the law on its head.

As moveable property, copyright can be transmitted by assignment, license (exclusive or non-exclusive), by testamentary disposition or by operation of law.<sup>109</sup> The effect of an assignment or exclusive license, for instance, is to vest the assignee or exclusive licensee with the right to sue for the infringement of the copyright like the owner of the copyright, among others.<sup>110</sup> To have legal effect, an assignment or exclusive license must be in writing.<sup>111</sup> The effect of an assignment may be limited ‘to only some of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area’.<sup>112</sup> Such limitations must be contained in the assignment and if not so contained, the assignment put the assignee entirely in the stead of the copyright owner for the period of the assignment.

The foregoing applies within the context of collective management. Generally, Nigerian CMOs are required to operate through the mandate of copyright owners. Subject to relevant provisions of the CMO Regulations, examined shortly, the mandate may be granted by way of assignments, exclusive license or non-exclusive license to CMOs. Where a copyright owner grants a CMO mandate by way of a non-exclusive license, such mandate simply means that the CMO’s powers to deal with the copyright is limited to administering of the rights within the context of collective management.

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<sup>108</sup> *MCSN v Compact Disc Technology Ltd & Ors* supra note 53.

<sup>109</sup> Nigerian Copyright Act, s11.

<sup>110</sup> Nigerian Copyright Act, s16; DO Oriakhogba ‘Authorship, ownership and enforcement of copyright: The Nigerian situation’ (2015) 3 *SAIPLJ* 40-54.

<sup>111</sup> Nigerian Copyright Act, s11(3).

<sup>112</sup> Nigerian Copyright Act, s11(2).

But the situation is not so clear in the case of assignments and exclusive licenses. This is so because an assignment or exclusive license has the legal effect of putting the assignee or exclusive licensee in the stead of the assignor or exclusive licensee, as the case may be, in respect of the right transferred.<sup>113</sup> However, the practice of collective management tends to vary from the legal implication of assignment and exclusive license of copyright.

To illustrate the foregoing point, take the case of music for instance. A composer of music has a bundle of rights made up of performing rights, which include the right to publicly perform live, publish or broadcast the music; reproduction rights (mechanical rights); and distribution rights. Ordinarily, a transfer by the composer of his/her copyright in the music to a CMO without a clear limitation as to the part of the bundle being transferred legally implies a divestment of the composer's copyright. However, within the context of collective management, the practice is that the composer is transferring only part of the bundle that can conveniently and efficiently be administered only through collective management. In practice, that part of the bundle is usually the performing right (less the right of the composer to live performance of the work). This is probably why Onyido, *et al* contended (as noted above) that an assignment to a CMO does not constitute an outright transfer of copyright in a work. This point is, however, debatable especially in situations where the assignment or exclusive license does not expressly preclude the CMO from managing other rights in the bundle. In such situations, it is important to take note of the practice relating to assignments and exclusive licenses in the relevant copyright industry relating to rights management when construing such assignments or exclusive licensees.<sup>114</sup>

### 3.5.1.3 Existing CMO argument

The challenge of the approval requirement based on s52(3) of the Nigerian Copyright Act has been laid to rest in the recent case of *MCSN v CBS (CBS)*.<sup>115</sup> That section refers to the transitional and savings provisions contained in the Fifth Schedule to the Nigerian Copyright Act and provides that its force cannot be affected by the repeal of

<sup>113</sup> *MCSN v Compact Disc Technology Ltd & Ors* supra note 53.

<sup>114</sup> Generally, see A Adewopo 'Developments in Collective Administration of Copyright, Licensing and Tariff Setting under Nigerian Copyright Law and Regulation' in DCJ Dakas et al (eds.) *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (2016) 677-700.

<sup>115</sup> Supra note 93.

the 1970 Decree. Specifically, s3(1) of the Fifth Schedule relates to copyright licensing contracts, which were executed before the commencement of the Nigerian Copyright Act. The above case was a reference by the FHC at the instance of the appellant.<sup>116</sup> The appellant had initiated a suit at the FHC and sought several declaratory, injunctive and compensatory reliefs against the respondent. The respondent objected to the jurisdiction of the FHC to hear the suit on the ground of lack of *locus standi* on the part of the appellant because the NCC had not approved the appellant as a CMO.

The reference called upon the Court of Appeal to interpret ss6(6)(c), 40 and 44 of the Constitution and ss17, 39 and 52 of the Nigerian Copyright Act. The appellant contended that s52 allows it to continue to operate as a CMO without the need for approval since it acquired most of the works in its repertoire through licenses executed long before the Nigerian Copyright Act came into force. The argument was rejected by the Court of Appeal because, contrary to the appellant's contention, s52(3) preserves only licensing contracts which were effective before commencement of the Nigerian Copyright Act. It does not jettison the requirement for a CMO to obtain the NCC's approval under s39.<sup>117</sup> Perhaps, the appellant's position in the above case would have been strengthened if it were an approved CMO before the commencement of the CMO Regulations, under which existing approved CMOs are deemed approved. They may continue operation for the unexpired duration of their approval. They must, however, apply for renewal under the CMO Regulations and for such purpose, must comply with the conditions for renewal of approval.<sup>118</sup> Further, the appellants would have succeeded under s52(3) if they have focused their argument on the copyright constituting their repertoire instead of focusing on their status as an existing CMO. Here, the appellant's argument would have been that the copyright in their repertoire were obtained before s17 came into force and that since s17 is not retrospective, it cannot be resorted by the respondent to prevent the appellant from enforcing their copyright that is saved under s52(3).<sup>119</sup>

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<sup>116</sup> Reference is done when a High Court in Nigeria is called upon to interpret the Constitution and the court is satisfied that the question involves a substantial issue of law: Constitution, s295(2).

<sup>117</sup> Supra note 93.

<sup>118</sup> Regulation 20.

<sup>119</sup> See *MCSN v Compact Disc Technology Ltd & Ors* supra note 53.

### 3.5.2 Conditions for approval, renewal and revocation of approval

Under the Nigerian Copyright Act, the NCC may approve a collecting society if it is incorporated as a company limited by guarantee; undertaking the main roles of a collecting society; represents a substantial number of copyright owners; and complies with the CMO Regulations.<sup>120</sup>

#### 3.5.2.1 *Incorporation as a company limited by guarantee*

By this requirement, CMOs in Nigeria must be non-profit organisations in terms of s26(1) CAMA, which provides:

‘Where a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its object and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by [CAMA], the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee’.

Opadere criticised this requirement as a ‘major error in law’, which poses ‘great limitations to the possibility of maximizing [CMOs]’.<sup>121</sup> The author’s stance is based on his perception that ‘a company limited by guarantee is mainly for the promotion [of] charity, not for profit making, nor distribution or sharing of profit among members, [...]’<sup>122</sup>.

However, s26 CAMA is not limited to companies having charity as their object. It includes companies for the promotion of art, culture, science, education, and research, among others. CMOs do not perform their roles as charitable organisations. To perform effectively, CMOs retain some percentage of the royalties collected on their members’ behalf. It could be argued that the percentage retained is the CMOs’ income. This income is not shared or distributed among their members. It is used to defray the administrative and management cost of the CMOs. What is distributed among members may not, technically, be referred to as the income of the CMOs. Rather, it is the funds of members collected by the CMOs on their behalf,<sup>123</sup> and in pursuance of their role as company limited by guarantee. It is to be ‘treated and accounted for as a liability owed

<sup>120</sup> Nigerian Copyright Act, s39(2).

<sup>121</sup> Opadere op cit note 74 at 295-297.

<sup>122</sup> Ibid.

<sup>123</sup> U Uctenhagen *Copyright Collective Management in Music* (2011) 103-105.

[by CMOs] to their members'.<sup>124</sup> Thus, requiring CMOs to be incorporated as companies limited by guarantee is not an error of law.

However, Baloyi and Hooijer appear to support Opadere's criticism.<sup>125</sup> According to the authors, 'if corporate law prohibits the distribution of financial benefits to members of a non-profit corporation without providing for exceptions resulting from the administration of members' rights, this is likely to affect the functioning of the [CMO]'.<sup>126</sup> In view of this, it is safer to adopt the incorporated trustees form provided for under s590(1) CAMA, which enables, among others, any association established for educational, literary, scientific, social, developmental, cultural, etc. to apply to the CAC to be registered as an incorporated trustee. The point being made is that CMOs would still operate as non-profit organisations if they were registered as incorporated trustees. Also, if the incorporated trustees form were adopted, the problem that may arise from the application of s26 CAMA would disappear. Alternatively, s26 CAMA should be amended with a clear exception in favour of CMOs. To this end, the exception contained in the South African Companies Act is recommended.<sup>127</sup> Under that law, CMOs in South Africa, which were previously companies limited by guarantee are now adopting a non-profit company form as defined by the law.<sup>128</sup> This will be discussed further in the next chapter.

The company-limited-by-guarantee corporate form for CMOs under the Nigerian Copyright Act may have been adopted because of the requirement for approval of the memorandum of association of a company limited by guarantee by the MoJ/AGF.<sup>129</sup> This is because given the public nature of CMOs' functions, the MoJ/AGF's approval of their memorandum of association may serve as some form of guarantee for public confidence in the CMOs. Further, the approval may operate as an exemption under s26 CAMA. Thus, allowing CMOs to distribute royalties among their members without running afoul of the provision prohibiting payment of company's income to members. The wide usage of the company-limited-by-guarantee corporate

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<sup>124</sup> *Shapiro v SARRAL*, unreported case no 14698/04 (6 November 2009).

<sup>125</sup> JJ Baloyi and R Hooijer *Collective Management Organisations – Tool Kit: Musical Works and Audio-Visual Works* (2016).

<sup>126</sup> Baloyi and Hooijer *ibid* at 62.

<sup>127</sup> Companies Act 71 of 2008, ss1, 8 and 10. Specifically, item 1(3)(c) of Schedule 1.

<sup>128</sup> Baloyi and Pistorius *op cit* note 2.

<sup>129</sup> CAMA, s26(5).



form for CMOs globally,<sup>130</sup> may be another reason for its adoption under the Nigerian Copyright Act. Interestingly, as part of the ongoing review of CAMA, a new s26(5) is being proposed in the CAMA (Repeal and Amendment) Bill, 2018 to replace the current s26(5) of CAMA.<sup>131</sup> The proposed s26(5) will jettison the requirement of the MoJ/AGF's approval of the memorandum of association of companies limited by guarantee and replaced with a duty on the CAC to advertise the application for registration on 3 national newspapers. The rationale for this proposal is that there is no justification for requiring the MoJ/AGF's approval memorandum of association of non-profit organisations incorporated as companies limited by guarantee and not requiring same for those registering as incorporated trustees. Moreover, such requirement for non-profit organisations under current s26(5) will protract the process of incorporation and frustrate the ease of doing business in Nigeria.<sup>132</sup>

### **3.5.2.2 *Undertaking the main roles of a CMO***

This criterion seems clear from the discussions of CMOs' roles in 2.3 above. To meet the criterion under the Nigerian Copyright Act, a CMO only needs to show by its memorandum of association that its main objects are negotiation and granting of copyright licenses, collecting of royalties on copyright owners' behalf and distributing same among them.

### **3.5.2.3 *Representation of a substantial number of copyright owners***

The Nigerian Copyright Act does not define 'substantial number of copyright owners' that a CMO needs to represent. The CMO Regulations fill in the gap. As part of the application for approval by a CMO, a membership list of not less than 100 copyright owners of the class sort to be represented by the CMO is required. The list must indicate the signed consent of prospective and/or actual members of the CMO.<sup>133</sup> This requirement by the CMO Regulations, however, seems to conflict with s17 of Nigerian Copyright Act. That section provides, among others, that any person representing more

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<sup>130</sup> See generally, Baloyi and Hooijer op cit note 123.

<sup>131</sup> Supra note 1.

<sup>132</sup> Senate Committee on Trade and Investment 'Executive Summary' 6 available at <http://placng.org/wp/wp-content/uploads/2018/05/Executive-Summary-of-a-Bill-for-an-Act-to-Repeal-the-Companies-and-Allied-Matters-Act-1990-and-Enact-the-Companies-and-Allied-Matters-Act-2018.pdf>, accessed 16 May 2018.

<sup>133</sup> Regulation 1(2)(e).

than 50 copyright owners of a category of copyright works cannot maintain an action for copyright infringement unless the NCC approves the person as a CMO.<sup>134</sup>

Resolution of the apparent conflict pointed out above may depend on how the phrase ‘more than 50 copyright owners’ is interpreted. First, the phrase seems to suggest that the substantial number of copyright owners required under the Nigerian Copyright Act for approval should be not less than 50 copyright owners as against the not-less-than-100 required by the CMO Regulations. This is because once a CMO represents more than 50 but less than 100 copyright owners, it cannot bring an action for infringement of copyright of its members unless the NCC approves it; and the NCC cannot approve such CMO because it may not be able to present a list of 100 members and above. Secondly, or in the alternative, it may be argued that the ‘more than 50 copyright owners’ in s17 of the Nigerian Copyright Act is specifically for the purpose of conferring right of access to court on CMOs while the not-less-than-100 members requirement of the CMO Regulations is specific to the application for approval. In other words, they both deal with separate matters. Thirdly, and perhaps the proper interpretation, would be that the phrase does not conflict with the CMO Regulations. From the wording of the CMO Regulations, the CMO is not expected to have up to 100 actual members. It suffices if the CMO has up to 100 prospective members evidenced by their signed consent. But s17 of the Nigerian Copyright Act refers to CMOs with actual members.

#### **3.5.2.4 Compliance with the CMO Regulations**

In addition to the membership list discussed above, a company seeking approval as a CMO is required to accompany the application with certain documents.<sup>135</sup> Upon receipt of the application, the NCC may require the CMO to advertise the application in designated newspaper(s).<sup>136</sup> The purpose of such advertisement may be to give those whose names are listed as members of the CMO and members of the general public opportunity to object to the approval of the CMOs. The ground of such objections may be that the CMO did not meet the conditions upon which the NCC may accept an application; that the persons whose names are listed as members did not sign up to be members; among others. Before accepting an application, the NCC must satisfy itself

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<sup>134</sup> Nigerian Copyright Act, s17(a).

<sup>135</sup> Regulation 1(2).

<sup>136</sup> Regulation 1(4).

that the company has complied with the requirements for approval and other issues such as arrangement for internal governance; competence of management staff; among others.<sup>137</sup>

The CMO Regulations do not require a company seeking approval to have a secretary. The issue is left to the CMOs to decide. For effective administration of a CMO, the office of a secretary is imperative.<sup>138</sup> Apart from its importance, it is also a compulsory legal requirement.<sup>139</sup> CMOs are private companies. Thus, the directors may appoint any person that appears to possess the requisite knowledge and experience for the office of secretary.<sup>140</sup> Baloyi and Hooijer strongly advocate the appointment of lawyers as company secretaries, who would double as legal counsel, for CMOs. The rationale for this is that lawyers are best equipped to handle issues involving ‘statutory and other legal compliance, litigation management, relations with external legal counsel, contract management, legal risk management, general legal advisory services, corporate governance and government relations’.<sup>141</sup>

The NCC is allowed to accept an application subject to any modifications, conditions or limitations it finds appropriate. The NCC may do this if at the time of the application the CMO is not able to meet the requirements for approval but the NCC considers that the CMO may be able to do so before a final decision is made.<sup>142</sup> Nonetheless, the NCC may refuse approval if it is not satisfied with the application of a CMO.<sup>143</sup> If otherwise, the NCC is obliged to issue a certificate of approval to the CMO.<sup>144</sup> Where an application is refused or accepted subject to modification, the NCC is obliged to provide in writing the grounds of such refusal or modification on request of the CMO and on payment of the prescribed fee.<sup>145</sup>

The Nigerian Copyright Act and CMO Regulations are silent on the continued existence of an unapproved CMO. But court pronouncements seem to suggest that an unapproved CMO is not an entity in law and cannot file any action in court. According to Abang J, ‘the [MCSN] ought to have obtained prior approval of the [NCC]

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<sup>137</sup> Regulation 1(3).

<sup>138</sup> Baloyi and Hooijer op cit note 125.

<sup>139</sup> CAMA, s293. Note that there is a proposal for removal of the mandatory requirement of company secretaries by private companies. See clause 331 CAMA Amendment Bill supra note 1.

<sup>140</sup> CAMA, s295

<sup>141</sup> Baloyi and Hooijer op cit note 125 at 138-139

<sup>142</sup> Regulation 1(7).

<sup>143</sup> Regulation 1(6).

<sup>144</sup> Regulation 1(5).

<sup>145</sup> Regulation 1(8).

appointing it a [CMO] before it *can file an action in court*' (emphasis mine).<sup>146</sup> Ikyegh, JCA's pronouncement is more direct. To the learned JCA, 'a [CMO] must obtain the approval of the NCC under section 39 [Nigerian Copyright Act] *before it will have legal existence* [...]' (emphasis added).<sup>147</sup>

The above pronouncements are far-reaching and erroneous. Recall that it is an offence to operate as a CMO without approval. Unapproved CMOs will also face hurdles in exercising right of access to the court to enforce any right under the Nigerian Copyright Act. However, non-approval of a CMO does not automatically convert the CMO to a non-entity, an inchoate entity or an illegal organisation. It does not automatically wind-up the CMO. Also, recall that incorporation as a company limited by guarantee is a condition for approving a CMO. Upon incorporation, a CMO is vested with corporate personality. It can own properties; sue and be sued in its corporate name; enter into contracts; and exists in perpetuity except wound-up, among others, under CAMA.<sup>148</sup> Thus, an unapproved CMO would be able to enforce other rights outside the Nigerian Copyright Act such as the right to sue for breach of contract; rights based on claims to moveable and immoveable properties, excluding copyright; right to apply for judicial review of administrative action; enforcement of fundamental rights, among others.<sup>149</sup>

After refusing an application for approval, the NCC should be able to file a petition before the FHC to wind-up the CMO. Sadly, the NCC does not fall under the class of those who may petition for winding-up of a company.<sup>150</sup> This may be cured by an amendment of the Nigerian Copyright Act to empower the NCC to file for winding-up of a CMO on the ground of non-approval; or allow the NCC to notify the CAC to file the petition or to strike off the CMO as a defunct company.<sup>151</sup> Alternatively, the law may be amended to have similar effect as s2 of the Austrian Collecting Societies Act, 2006, which allows the supervisory body to shut down an unapproved CMO. These recommendations are made on the reasoning that having not approved a CMO, it makes no sense allowing it to exist since the main reason for its incorporation would

<sup>146</sup> *MCSN v COSON*, unreported Suit No.: FHC/L.CS/377/2013 (24 October 2014) 13.

<sup>147</sup> *MCSN v Detail* supra note 80 at 17.

<sup>148</sup> CAMA, s37.

<sup>149</sup> Odion and Oriakhogba op cit note 6.

<sup>150</sup> CAMA, s 410 contains the list of persons who may petition for winding up of a company. The grounds for winding up are stated in CAMA, s408.

<sup>151</sup> CAMA, s525 empowers CAC to declare companies as defunct. The conditions for exercising this power are provided for in the section.

have been defeated. Another way to get around this would be to amend the Nigerian Copyright Act to remove the incorporation requirement and instead require CMOs applying for approval to present an undertaking to incorporate. The law will then make an approval license from the NCC a requirement for incorporation by the CAC. This way, a non-approval by the NCC automatically prevents the legal birth of the CMO.

An approval granted by the NCC has a life span of three years subject to renewals for another two years.<sup>152</sup> Every application for renewal of the first license must be made within six months before its expiration. The application for renewal must be accompanied by an up-to-date list of the members and the repertoire of the CMO at the time of application for renewal.<sup>153</sup> The CMO Regulations does not expressly stipulate the period within which application for renewal of a subsequent license may be made. However, it appears the six months period provided in respect of the application for the first license applies to application for renewal of subsequent licenses. A different interpretation may be out of tune with the CMO Regulations. This being said, the NCC may grant a license of renewal if it is satisfied of the CMO's conduct and compliance with the Nigerian Copyright Act and CMO Regulations.<sup>154</sup> The approval of a CMO is revocable at any time. This may be done on the NCC's own motion or on application by any interested person. The grounds for revocation of approval include non-compliance with the Nigerian Copyright Act and CMO Regulations; non-representation of class of copyright owners for which the initial approval was granted, among others.<sup>155</sup>

### 3.5.3 Locus standi of CMOs

*Locus standi* is defined as the right of action that a litigant has in a cause of action and it is a condition precedent to the enjoyment of the constitutional right of access to the courts.<sup>156</sup> To have *locus standi*, a litigant must show how his/her personal right has been injured by the wrong complained about. The litigant cannot rely on the injury of another to clothe him/herself with *locus standi*. *Locus standi* is a jurisdictional issue. Lack of it on the part of a litigant prevents the court from exercising jurisdiction over a matter. In determining questions of *locus standi*, the rule is that the courts must have

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<sup>152</sup> Regulation 1(9).

<sup>153</sup> Regulation 3(1).

<sup>154</sup> Regulation 3(2).

<sup>155</sup> Regulation 2.

<sup>156</sup> Odion and Oriakhogba op cit note 6.

recourse primarily to the originating processes and the averments in the statement of claim filed by the claimant in a matter along with any document attached thereto. *Locus standi* may be conferred by statute or may arise from particular facts.<sup>157</sup>

Section 16 of the Nigerian Copyright Act is an example of statutory conferral of *locus standi*. Under that section, an owner, assignee or exclusive licensee of copyright has *locus standi* to initiate an action for infringement of that copyright in the FHC. However, the *locus standi* conferred by s16 is not absolute. It is subject to s17 of the Nigerian Copyright Act, which provides:

‘[...] no action for the infringement of copyright or any right under the [NCA] shall be commenced or maintained by any person –(a) carrying on the business of negotiating and granting of licenses; (b) collecting and distributing royalties in respect of copyright works or representing more than fifty owners of copyright in any category of works protected by [the Nigerian Copyright Act], unless it is approved under section 39 [...] or is issued with a certificate of exemption by the [NCC]’.

By way of an aside, s17 of the Nigerian Copyright Act is not peculiar to Nigeria. A similar provision exists in s1(3) of the German Law on the Administration of Copyright and Neighbouring Rights. The section prohibits unauthorised CMOs in Germany from asserting or claiming any rights entrusted to them.<sup>158</sup> It precludes them from filing any criminal complaint under s109 of the German Copyright Act.<sup>159</sup> Section 2(2) of the Austrian Collecting Societies Act also shares similarity with s17 of the Nigerian Copyright Act.

The provision of s17 of the Nigerian Copyright Act and its effect on CMO’s right of action for copyright claims has been the subject of several legal controversies,<sup>160</sup> which were eventually resolved by the Supreme Court in early December 2018.<sup>161</sup> The cases at the heart of the controversies have been extensively

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<sup>157</sup> Ibid.

<sup>158</sup> This section was applied by German Court of Appeal in Cologne to prevent a Turkish collecting society from bringing a copyright claim on the ground that the collecting society was not approved to operate as such in Germany: Higher Regional Court Cologne, September 28, 2007, Foreign Copyright Collective, (2008) *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR) 69.

<sup>159</sup> Copyright Act, 1965 (Federal Law Gazette I, p. 1273).

<sup>160</sup> *MCSN v Adeokin* (2007) 13 NWLR Pt1052 616; *Compact Disc v MCSN* supra note 52; *MCSN v CBS* supra note 93; *NCC v MCSN* supra note 56; *MCSN v Adeokin*, unreported Suit No.: FHC/L/CS/216/96 (9 July 1997); *Multichoice v MCSN*, unreported Suit No.: FHC/L/CS/1091/11 (8 October 2012); *MCSN v Compact Disc* 51 NIPJD [FHC. 2008] 713/2007; *PMRS v Skye Bank and Ors.* Supra note 52; *Multichoice v MCSN* (*Multichoice*); Unreported Suit No.: FHC/L/CS/1091/11 (19 January 2018).

<sup>161</sup> *MCSN v Compact Disc Technology Ltd & Ors.* supra note 53; *Adeokin Records v MCSN* supra note 53.

reviewed elsewhere.<sup>162</sup> However, it remains to be said that in terms of the Supreme Court's judgement on the *locus standi* question, CMOs may initiate copyright infringement claims as (a) owner, (b) assignee and (c) exclusive licensee of copyright. This is so because, under sections 10 and 11 of the Copyright Act, copyright ownership may vest in natural persons (humans) and juristic persons (corporate entities, for instance).<sup>163</sup> As stated above, copyright ownership is acquired through authorship, assignments, or exclusive licenses. Also, as a condition to obtaining the NCC's approval, CMOs are required to be incorporated as companies limited by guarantee in Nigeria. The incorporation makes them juristic persons such that they can and usually do obtain copyright ownership via assignments and or exclusive licenses. Thus, CMOs may initiate copyright infringement actions in their personal capacity as owners, assignees and exclusive licensees of copyright in terms of s16 of the Nigerian Copyright Act without the need for approval by the NCC.

Furthermore, CMOs may initiate copyright infringement actions as (d) persons involved in the business of negotiating, granting of licences, collection and distribution of royalties for not more than fifty owners of copyright in any class of works. They may also initiate actions as (e) associations of copyright owners established in terms of s39 of the Nigerian Copyright Act. CMOs falling under both categories (d) and (e) can only commence copyright claims in representative capacities. Aside suing in representative capacities, CMOs coming under category (d) will not require approval of the NCC to enjoy the right of action in terms of the Copyright Act. However, CMOs acting for more than fifty copyright owners will fall under category (e) and will most likely face the *locus standi* challenge under s17 of the Nigerian Copyright Act, especially if the copyright they seek to enforce was assigned or exclusively licensed to them after the commencement date of s17.

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<sup>162</sup> Odion and Oriakhogba op cit note 6; DO Oriakhogba, 'Copyright collective management organizations in Nigeria: the *locus standi* conundrum resolved?' (2019) 14(2) *JiPLP* 127-135; C Okorie, 'Nigerian Supreme Court issues guidance on *locus standi* of collecting societies' (2018) 13(12) *JiPLP* 931; OA Olatunji, et al, 'The legality and signification of the AGF's directive approving a second musical CMO in Nigeria' (2018) *IIC* <https://doi.org/10.1007/s40319-018-0771-6> accessed 31 December 2018; DO Oriakhogba and E Erhagbe 'How the Nigerian Supreme Court finally resolved the copyright collective management organisations' *locus standi* conundrum' (2019) *JiPLP* (forthcoming).

<sup>163</sup> CB Ncube and DO Oriakhogba, 'Monkey selfie and authorship in copyright law: focus Nigeria and South Africa' (2018) 21 *PER/PELJ* available at <https://journals.assaf.org.za/index.php/per/article/view/4979/7393>, accessed on 31 December 2018.

That being said, while the Supreme Court's judgment has not annulled s17 of the Nigerian Copyright Act, it has watered down its impact on the right of action for unapproved CMOs. The point has already been over-flogged that, based on the judgment, CMOs have the right to initiate copyright infringements claims in their personal capacity as owners, assignees and exclusive licensees. In such cases, they are completely covered under s16 of the Nigerian Copyright Act. They may also initiate such actions in representative capacities as acting for less than or more than fifty copyright owners in respect of the class of copyright work under issue. However, in practice, this would not prevent an opposing party from raising the issue of *locus standi* under s17, especially where the CMO in question has not been approved by the NCC.

Even so, on the strength of the Supreme Court's judgments, the CMO would escape the clutches of s17 by showing that it sued in the capacity of owner, assignee and exclusive licensee and that the copyright it sought to enforce was acquired before the section came into being. Alternatively, the CMO may show that it initiated the action in a representative capacity on behalf of less or more than fifty copyright owners (as the case may be) and that the copyright it seeks to enforce was acquired before the commencement of s17 (10 May 1999). Where the CMO fails in any of the alternative approaches, it is submitted that such CMO cannot hide behind the Supreme Court's decisions to avoid s17 of the Nigerian Copyright Act. Indeed, in view of the Supreme Court's decisions, the time or point when the issue of *locus standi* is raised in a copyright infringement case initiated by an unapproved CMO is not important in resolving the *locus standi* question under s17 of the Copyright Act. The important question to be resolved will be whether or not the unapproved CMO obtained the copyright in its repertoire through assignments and/or exclusive licenses executed before or after the commencement date (10 May 1999) of s17 of the Nigerian Copyright Act.

#### **3.5.4 Number of CMOs**

The monopolistic nature of CMOs and its implication on competition within the collective management and licensing markets have been examined in 1.1 and 2.4 above. Generally, they are natural or *de facto* monopolies (that is, without legislative backing). However, in some countries, they also exist as *de jure* monopolies obtained by legislative recognition of existing private CMOs; by legislative creation of a public



utility body as CMO; or by a concession system that empowers a regulatory body to approve a CMO among different applicants.<sup>164</sup>

The Nigerian Copyright Act provides the concession system. It promotes a monopoly – with legal recognition, but which is not exempt from competition law’s scrutiny – for the respective classes of copyright owners through an approval system administered by the NCC, as reflected under s39(1) and (3). According to the section, a CMO ‘may be formed in respect of any one or more rights of copyright owners [...]’. However, the NCC ‘shall not approve another [CMO] in respect of any class of copyright owners if it is satisfied that an existing approved [CMO] adequately protects the interest of that class of copyright owners’.

In essence, therefore, the Nigerian Copyright Act allows only one CMO administering one or more rights per class of copyright owners. But it grants the NCC discretion to approve another CMO for the same class of copyright owners if it considers that the existing approved CMO cannot take care of the interest of the copyright owners in that class. The Nigerian Copyright Act does not define ‘class of copyright owners’ for the purpose of this section. However, according to Ola, the issue can be resolved by recourse to the types of works protected under the Nigerian Copyright Act.<sup>165</sup> Thus, a work protected under the Nigerian Copyright Act forms a class of copyright and the owners of copyright in that work form a class of copyright owners. The Nigerian Copyright Act protects literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, performances, and expressions of folklore.<sup>166</sup> While the NCC has the sole right to administer rights in expressions of folklore,<sup>167</sup> CMOs may be formed to administer the rights in other works. The copyrights in the respective works that are protected are also identified in the Nigerian Copyright Act.<sup>168</sup> For purpose of s39, it could be said that a ‘class of copyright owners’ means for instance, copyright owners of the copyright in literary works or musical works or sound recordings as the case may be.

A scenario that may give rise to the exercise of discretion by the NCC to approve more than one CMO for a class of copyright owners is where a CMO approved for a class of copyright owners does not administer the rights of other members of

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<sup>164</sup> J Drexl *Copyright, Competition and Development* (2013) 224-225.

<sup>165</sup> Ola op cit note 9 at 72.

<sup>166</sup> Nigerian Copyright Act, s1, 26 and 31.

<sup>167</sup> Nigerian Copyright Act, s31(4).

<sup>168</sup> Nigerian Copyright Act, s6, 7, 8, 9, 26 and 31.

similar class of copyright owners. For instance, if CMO (A) is approved to administer the public performance and mechanical rights in music for authors, composers and publishers of music, the NCC would be able to approve CMO (B) administering the same rights for performers. It would also be able to approve another CMO (C) to administer the same rights for producers of sound recordings as the case may be.

Another scenario that may goad the NCC to exercise this discretion is where it considers that an existing approved CMO is not adequately equipped in terms of human resource capacity, international collaboration, technical know-how and adequate repertoire to administer copyright for that class of copyright owners.<sup>169</sup> This scenario played out in 2005 resulting in the approval of MCSN to operate in the music industry alongside the defunct PMRS.<sup>170</sup>

However, the NCC's current approach is based on the belief that maintaining a monopoly by approving a CMO per class of copyright owners will best ensure efficiency in collective management in Nigeria.<sup>171</sup> But, will CMOs be more efficient if a monopoly is promoted, or if competition is fostered by regulation, or if market forces are allowed to determine the question of monopoly of collecting societies? There are differing views on this issue, especially from a competition law perspective which have already been discussed in 2.4 above.

For now, to put discussions in this chapter in proper perspective, it is important to note, as pointed out in 2.4.3 above, that the existence of more than one CMO for a class of right is no indication of competition on the user side since the respective repertoire of the CMOs are usually complementary in practice. It may also not be indication of competition for copyright owners. Thus, when examining s39(3) the focus should be on how to organise CMOs in the industries within the ambit of the section to tackle abuse of market power by CMOs. This is because, as was shown in 2.4.3 above, whether one or more CMOs exists in both markets, anti-competitive concerns are bound to arise. Do the Nigerian Copyright Act and the CMO Regulations empower the relevant regulatory body to deal with such concerns? The resolution of this issue will form the core of discussion in chapter five below.

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<sup>169</sup> NCC 'Collective Administration in the Music Industry' (6 May 2005) unpublished position paper.

<sup>170</sup> *Ola op cit* note 9 at 19.

<sup>171</sup> *Ezeilo op cit* note 46.

The challenges in applying s39(3) in the music industry led to the HofR's resolution mentioned earlier.<sup>172</sup> Among others, the resolution called on the NCC to approve the MCSN and 'revisit the application of other organisations' that applied for approval as CMOs, 'regardless of the existence or non-existence of a licensed [CMO] for musical works in Nigeria'.<sup>173</sup> The resolution aligned with Ola's argument for multiple CMOs per class of copyright,<sup>174</sup> which was echoed as justification in the MoJ/AGF's directive to NCC for approval of the MCSN. As a further justification, the MoJ/AGF also cited the 'emerging and expanding role of the internet' and its impact on collective management,<sup>175</sup> already discussed in 2.4.2 above. This seems to resonate with the views that digitisation has made less relevant the transaction cost argument as justification for CMOs' monopoly since it makes management through rights aggregators and individual rights management, including through blockchain technology, possible. However, as argued in 2.4.2, the challenges posed by digitisation are strong arguments in favour of a single CMO in form of a one-stop-shop. Nonetheless, if the MoJ/AGF's contention is that COSON is not well equipped to face the challenges brought about by the Internet and that MCSN's approval is necessary for some collaborative efforts, then, the directive for the approval of another CMO is justified. This aligns with the view expressed above on possible scenarios for the exercise of discretion by the NCC under s39(3).

This being said, the approval of another CMO is commendable. It is a first step towards resolving the collective management crisis in the music industry. The better approach to resolve the crisis, however, is not to approve two CMOs for same rights and same class of copyright owners. This approach would continue to engender crisis in the form of unhealthy anti-competitive manoeuvres between the CMOs; confusion on ownership of copyright in particular works; confusion on the part of copyright owners as to which CMO to belong to; difficulty in obtaining licenses; a non-united and weak bargaining platform for copyright owners vis-à-vis large copyright users in the music industry; among others. In sum, it may lead to 'duplication of functions and reduction in economics of scale and thus [is] unlikely to bring benefits'<sup>176</sup> to members

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<sup>172</sup> Op cit note 21.

<sup>173</sup> Ibid.

<sup>174</sup> Ola op cit note 9 at 91.

<sup>175</sup> Op cit note 22.

<sup>176</sup> DTI *Copyright Review Commission Report* (2011) 41.

of the CMOs. Approving a single CMO for the entire music industry is not a better approach either.<sup>177</sup> Both approaches would run against the spirit and letters of s39(3).

The way forward would be to reorganise collective management in the music industry. Such reorganisation should be based on a proper understanding of the structure of copyright relating to music under the Nigerian Copyright Act. A piece of music contained in a CD, for instance, is not indivisible in terms of the copyright contained in it. Copyright in a piece of music should not be regarded as belonging to a single class of copyright owners (although, in modern times it is of course possible to have one person own all the copyright in a piece of music). Yet, generally every piece of music in a CD may be a combination of literary works (the lyrics), musical works (the composition or rhythm), sound recordings and performances. It may also be a combination of two of these works, usually the musical work and sound recording. And different people generally own the copyright in these works. Thus, it could be argued that the music industry is multi-class in terms of works and copyright ownership. The music industry includes owners of copyright in literary works, musical works, sound recordings and performances respectively. This may be distinguished from other fields of collective management, such as in the audio-visual industry in Nigeria, which appears mono-class. In the Nigerian audio-visual industry, for instance, authors of cinematographic films form the major class of copyright owners. This is so because, in terms of s51(1) of the Nigerian Copyright Act, they are defined as the persons who made arrangements for the making of the films and subject to the provisions of s10,<sup>178</sup> such persons are the owners of copyright in the films. Further, they are obligated under s10(4) to conclude, prior to the making of the film, written contracts with other copyright owners whose works are to be used in the films. According to Koskinen-Olsson and Lowe, in practice, the persons who made arrangement for the making of the film are the producers and the contract they conclude with other copyright owners

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<sup>177</sup> For possible impact of the MoJ/AGF's directive: T Tagbor 'The Nigerian music industry: consequences of COSON and MCSN coexistence' (2017) available at <https://nlipw.com/wp-content/uploads/Consequences-of-COSON-and-MSCN-Coexistence-.pdf>, accessed on 20 October 2017.

<sup>178</sup> In terms of this section, ownership of a work initially vests on the author, subject to other exceptions such as works done under employment or commission where ownership has been transferred in writing by the author to the employer or commissioner of the work, among other exceptions.

whose works are used in the film usually include transfer of copyright to the producers by such copyright owners.<sup>179</sup>

In terms of collective management, the music industry appears very rewarding. The earnings from that industry in terms of royalty distribution through CMO, as shown in the previous chapter, are huge and they increase annually. Naturally, such venture will attract varying interests with the effect that more persons will be interested in establishing CMOs in the industry.

Therefore, it is recommended that the work-based collective administration approach be adopted to reorganise collective management in the music industry. The work-based approach is when CMOs are established to administer copyright based on types of copyright work.<sup>180</sup> Here, the emphasis is on types of copyright work and class of copyright owners. This is different from the rights-based approach where the emphasis is on types of copyright.<sup>181</sup> For instance, following the work-based approach, CMO (A) may be established to administer copyrights in sound recordings belonging to music producers. On the other hand, CMO (B) may be established to administer copyright in musical works belonging to authors, composers and music publishers. Still, another CMO (C) may be established to administer copyright in performances belonging to performers. Consequently, three CMOs will then exist under s39(3), with each of them as a monopoly over the management of the copyright in their respective repertoires.

Adewopo seems to be in disagreement with the above approach. He seems to prefer a single CMO for the music industry. According to Adewopo, ‘there would be no better way to promote an organised confusion, not only as between the authors themselves but also among the various categories of users of the same work(s)’ if different CMOs existed as proposed above. Further, Adewopo believes that ‘it would [...] be an administratively inefficient and counterproductive manner of managing resources, which negates the original objective of the idea of pooling of resources under [collective management]’.<sup>182</sup>

Contrariwise, one could argue, however, that the above recommendation is not novel. It finds support, for instance, in the law and practice in Kenya, which seems to

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<sup>179</sup> T Koskinen-Olsson and N Lowe *Educational Materials on Collective Management on Copyright and Related Rights Module 3* (2012) 14.

<sup>180</sup> Ola op cit note 9 at 72.

<sup>181</sup> Ibid.

<sup>182</sup> Adewopo op cit note 114.

negate Adewopo's position. The Kenyan Copyright Act<sup>183</sup> has a similar provision as s39(3) of the Nigerian Copyright Act.<sup>184</sup> Section 46(5) of the Kenyan Copyright Act provides that the '[b]oard shall not approve another [CMO] in respect of the same class of rights and category of works if there exists another [CMO] that has been licensed and functions to the satisfaction of its members'. Generally, s46 of the Kenyan Copyright Act places CMOs under the regulation of the Kenya Copyright Board (KECOBO). It also requires CMOs to be licensed by KECOBO before they can operate in Kenya. In exercising its discretion under s46(5), KECOBO has approved formed the practice of approving three CMOs for the music Kenyan industry:<sup>185</sup> one to administer the copyrights of authors, composers and publishers of musical works; another to administers the copyright of music producers in sound recordings; and a last one to manage the copyright of performers in musical works.<sup>186</sup>

It is suggested here that the foregoing recommendation would lead to inclusiveness of all stakeholders in the Nigerian music industry, while preserving the CMOs' monopoly in respect of their respective repertoire. The similarity in the copyright of the respective copyright owners in the music industry should make the recommended arrangement workable. This may not be without some challenge particularly on the user side of the copyright market. Users of copyright works are interested in obtaining a single license that allows them access all music related works. They try to avoid anything perceived as double or even triple licensing.<sup>187</sup> Users are also interested in quick and uncomplicated licensing windows.

This challenge can be surmounted through the creation of a common window wherein users would obtain a single license covering the repertoire of the respective CMOs. The CMOs would then have to sort out their respective royalties. A memorandum of understanding executed by the CMOs will define the licensing issues

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<sup>183</sup> Copyright Act, CAP 130, Laws of Kenya, 2014.

<sup>184</sup> A similar provision is also found in the Austria: Austrain Collecting Societies Act, s3(2).

<sup>185</sup> KECOBO 'Public Notice: Clarification on CMOs Licensed by KECOBO to Collect Royalties in 2018' 25 January 2018.

<sup>186</sup> <http://www.copyright.go.ke/media-gallery/news-and-updates/323-kecobo-approves-music-publishers-association-of-kenya-mpake-to-collect-royalties-for-authors-composers-and-publishers.html>, accessed on 22 May 2017; <http://www.kamp.or.ke/who-we-are/>, accessed on 10 June 2017; <https://www.prisk.or.ke/index.php/en/>, accessed on 10 June 2017; VB Nzomo 'Rethinking the regulation of collective management organisations in Africa: legislative lessons from Kenya, South Africa and Nigeria' (2016) 1(1) *AJIP* 1-18.

<sup>187</sup> DTI op cit note 176 at 56-57.

and the rights of the CMOs.<sup>188</sup> A similar arrangement exists in Kenya. Recently, the Attorney General of Kenya issued a legal notice for a joint music tariff. The notice requires a joint royalty invoice to be issued by the musical CMOs in Kenya.<sup>189</sup> Another arrangement exists in Kenya for online uses of musical copyright. The arrangement was borne out of the agreement among the Kenyan musical copyright CMOs. It is a single online licensing platform, known as *ngoma* license.<sup>190</sup>

The recommendation may not pose a challenge on the copyright owners' side of the market. A person whose copyright ownership cuts across the types of works noted above would be at liberty to register as member of all CMOs. As will be shown shortly, CMOs are prohibited from placing restrictions on the member's rights to join other CMOs. The NCC can initiate the reorganisation being recommended pursuant to its powers in s39(9) already discussed above.

### **3.5.5 Relationship between CMO and their copyright owners**

This part focuses on the provisions relating to membership and royalty distribution under the Nigerian Copyright Act and CMO Regulations. The issues are whether CMOs have a duty to grant membership to copyright owners in the class for which the CMOs are approved; whether CMOs can restrict the copyright exclusivity of their members and the capacity of their members to withdraw membership; and whether CMOs are free to discriminate against members of the same class in terms of royalty distribution? As will be seen in chapter five below, these questions underline the CMOs' competition concerns in their relationship with copyright owners.

#### **3.5.5.1 Membership of CMOs**

The CMO Regulations require all CMOs to open their membership to all copyright owners of the category of works or classes of rights for which the CMOs seek approval, or are approved, to operate.<sup>191</sup> For the purpose of admitting copyright owners as members, CMOs are allowed to make provisions for collective membership through an association of copyright owners.<sup>192</sup> REPRONIG has adopted this style of

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<sup>188</sup> Baloyi and Hooijer op cit note 125 at 111-112.

<sup>189</sup> Collecting Societies Tariffs, Legal Notice No. 57, Kenya Gazette Supplement No. 56 of 21 April 2017.

<sup>190</sup> Baloyi and Pistorius op cit note 2 at 405-406, fn 176.

<sup>191</sup> Regulation 4(1)

<sup>192</sup> Regulation 4(4)

membership.<sup>193</sup> In such cases, the CMOs may claim an indemnity undertaking from such association against claims from the actual copyright owners in respect of any royalty distributed to the association or agent.<sup>194</sup>

CMOs are prohibited from requiring copyright owners to appoint them as sole collecting agents. In other words, CMOs cannot make assignment of all rights in a work by copyright owners a compulsory requirement for membership. CMOs are also prohibited from requiring copyright owners to make them agent for any other purpose outside collective management.<sup>195</sup> The prohibition extends to mandatorily requiring copyright owners to assign to them the right to collect royalties from equivalent foreign CMOs.<sup>196</sup>

However, CMOs may require copyright owners to appoint them as agents, albeit not mandatorily, for collective management.<sup>197</sup> This is because CMOs are prohibited from administering copyright in works over which they have not been duly authorised.<sup>198</sup> A copyright owner has the right to withdraw his membership from, or the copyrights assigned to, the CMO. But reasonable notice to the CMO of intention to withdraw membership must be given to the CMOs.<sup>199</sup> The question of reasonable notice is left for the CMO and the copyright owner to determine by contract. Although not stated in the CMO Regulations, copyright owners may appoint a CMO as their sole agent for collective management. This finds support in the principle of copyright exclusivity and the freedom of copyright contract embedded in s11 of the Nigerian Copyright Act. However, copyright owners must act willingly without any inducement, coercion or misrepresentation on the part of the CMO.

In executing a membership contract, the provisions of s11 of the Nigerian Copyright Act ought to be kept in mind. Accordingly, an assignment or license may also be granted in respect of a future or an existing work in which copyright does not yet exist.<sup>200</sup> Further, an assignment or license granted by one copyright owner shall operate as if granted by his co-owner in cases of co-ownership of copyright. In such

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<sup>193</sup> REPRONIG 'Members' available at <http://repronig.ng/members/>, accessed 8 May 2018.

<sup>194</sup> Op cit note 215.

<sup>195</sup> Regulation 4(2)

<sup>196</sup> Regulation 4(3). See J Onyido 'Copyright Collective Rights Management in Nigeria' (2017) *The Copyright Lawyer* 38-40.

<sup>197</sup> Ibid.

<sup>198</sup> Regulation 17(1)(a) and (b). The effect of this provision vis-à-vis Regulation 11 has been discussed in the previous chapter.

<sup>199</sup> Regulation 6.

<sup>200</sup> Nigerian Copyright Act, s11(7)



cases, subject to any contracts between them, the royalties received would be divided equitably between the co-owners of the copyright.<sup>201</sup> Persons are deemed co-owners if they share a joint interest in the whole or any part of a copyright; or have interests in the various copyrights in a composite production – that is, a production consisting of two or more works.<sup>202</sup> The CMO Regulations provides sanctions for violations of the prohibitions discussed so far, and for other prohibitions, by CMOs.<sup>203</sup>

As members of CMOs, copyright owners are conferred with certain rights and privileges under the CMO Regulations. This is in addition to whatever privileges, reliefs or remedies they are entitled to under their membership agreements with the CMOs.<sup>204</sup> Members of CMOs have a right to one vote each at general meetings. The aim of the voting right is to ensure that members are in charge or take part in the decision-making process of the CMOs. Copyright owners are also entitled to obtain the annual statement of accounts, annual reports, and auditor's reports, among others, of their CMOs.<sup>205</sup>

### **3.5.5.2 Royalty distribution**

Royalty distribution is one of the core objectives, and a means of gauging the performance, of CMOs. The CMO Regulations obligates CMOs to distribute royalties among their members in a manner that reflects, as nearly as possible, the actual usage of the works in the CMOs' repertoire.<sup>206</sup> Thus, CMOs are expected to establish a fair and equitable distribution plan based on a procedure acceptable to their members and on the information supplied by users.<sup>207</sup> The CMO Regulations does not expressly require the NCC's approval of CMOs' royalty distribution plan. CMOs are, however, obligated to notify and furnish the NCC with any documentation, report or information required by the NCC,<sup>208</sup> and this may include the distribution plan.

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<sup>201</sup> Nigerian Copyright Act, s11(5)

<sup>202</sup> Nigerian Copyright Act, s11(6)

<sup>203</sup> Regulations 4(5) and 19 contain sanctions for non-compliance with the Nigerian Copyright Act and CMO Regulations by collecting societies. The sanctions include written warn by the NCC to the management official of an erring collecting society; suspension of the approval license of the erring collecting society; revocation of the approval license; and disqualification of the management official from holding management position in any collecting society in Nigeria.

<sup>204</sup> Regulation 5(4)

<sup>205</sup> Regulation 5(1) and (2).

<sup>206</sup> Regulation 15(1)

<sup>207</sup> Regulation 15(2).

<sup>208</sup> Regulation 7(1)(f).

Before distributing royalties to members, CMOs are allowed to deduct their administrative costs from the royalties collected for the year in question. The amount deducted must not exceed the limits to be decided by the CMOs' governing board, subject to a maximum limit of 30% of the total royalties collected.<sup>209</sup> In appropriate cases, and upon a written application by CMOs, the NCC may increase the maximum beyond 30%.<sup>210</sup> CMOs are prohibited from exceeding the 30% maximum limit or any other limit approved by the NCC.<sup>211</sup>

It is difficult to determine a generally reasonably justifiable maximum limit for management costs. An important consideration is the state of development of collective management in the country. Scholars seem to concur with the 30% maximum limit in a relatively young system like that of Nigeria.<sup>212</sup> The public awareness and appreciation of CMOs' role is only recently rising in Nigeria. Nigerian CMOs still face the daunting task of negotiating and obtaining licenses from copyright users as a result of the not too strong culture of respect for copyright.<sup>213</sup> Consequently, high management costs on the part of CMOs appear inevitable. Hence, it is proper to afford CMOs a means of recouping their administrative expenses. The 30% maximum limit placed by the CMO Regulations may be justifiable on this ground. However, the discretion to increase the maximum limit by the NCC should be sparingly exercised. Otherwise, it may give room for abuse as it may be used to rip-off copyright owners. It should only be exercised where CMOs have shown evidence of efficient management on their part but challenges in the copyright management and licensing markets make excessive management cost indispensable.

Recent events in collective management in music and sound recording in Nigeria tends to call to question the level of compliance with and enforcement of the provisions of the CMO Regulations on royalty distribution. While generally exploring the level of compliance to the CMOs' regulatory framework in Nigeria is beyond the scope of this thesis, the following event is highlighted because of its relevance to the present discussion.

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<sup>209</sup> Regulation 10(1)

<sup>210</sup> Regulation 10(2)

<sup>211</sup> Regulation 10(3)

<sup>212</sup> Uchtenhagen op cit note 123 at 104-105; M Ficsor *Collective Management of Copyright and Related Rights* (2002) 147-148.

<sup>213</sup> Olatunji, et al op cit note 5.

In a letter addressed to the Board of COSON, some stakeholders made the following strong allegations: (a) that ‘the criterion for [royalty distribution] is not usually clear, and actual amount paid is always far less than the amount approved for distribution’; (b) that ‘the distribution policy of [COSON] is rather opaque and appears not to be fair’ and ‘it does not seem that much effort is being made to make the process better’; and (c) deduction of administrative costs in excess of the 30% maximum allowed by the CMO Regulations. The letter triggered a chain of events leading first to the removal of Chief Tony Okoroji as chairman of COSON’s Board and his replacement with Efe Omorogbe on 7 December 2017; the controversial reconstitution of COSON’s Board with Chief Tony Okoroji as chairman in an extra-ordinary general meeting on 19 December 2017; a petition to the DG of NCC by stakeholders of COSON; and NCC’s directive to COSON not to give effect to the resolutions reached at the extra-ordinary general meeting, ‘except the resolution on distribution of royalties to members’.<sup>214</sup> The implication of NCC’s directive is that the removal of Chief Tony Okoroji and replacement with Efe Omorogbe as COSON’s chairman by the board on 7 December 2017 remained the position. Despite ‘some observed irregularities’ in the 19-December-2017 extra-ordinary general meeting, the NCC approve the royalties distributed in the extra-ordinary general meeting because the extra-ordinary general meeting was validly conveyed for the purpose of royalty distribution only.<sup>215</sup> It should be noted that COSON failed to comply with the NCC directives and this prompted the suspension of COSON’s approval mentioned above. The NCC also restrained spending from COSON’s account, except for payment of salaries.<sup>216</sup>

CMOs are mandated to establish a ‘Holding Account’.<sup>217</sup> That account must be used to hold any amount from the royalties and fees collected, which cannot be distributed for the following reasons –<sup>218</sup>

- the CMO has lost contact with the member concerned;
- the person entitled to the share is not currently a member of the CMO;

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<sup>214</sup> NCC’s letter to COSON’s general manager dated 19 February 2018 (in file with author).

<sup>215</sup> NCC ‘Text of Press Briefing by the Director General, Nigerian Copyright Commission, Mr. Afam Ezekude, on the Dispute in the Governing Board of Copyright Society of Nigeria LTD/GTE (COSON)’ available at <http://www.copyright.gov.ng/index.php/news-events/item/427-text-of-press-briefing-by-the-director-general-nigerian-copyright-commission-mr-afam-ezekude-on-the-dispute-in-the-governing-board-of-copyright-society-of-nigeria-ltd-gte-coson>, accessed 8 May 2018.

<sup>216</sup> NCC’s Letter to the General Manager, COSON dated 3 May 2018 (in file with author).

<sup>217</sup> Regulation 11(1).

<sup>218</sup> Ibid.

- the member or his/her agent is not ascertainable; or the copyright owner or his/her agent entitled to the share is not ascertainable;
- there is a dispute as to entitlement to the share; and
- a portion of amount collected cannot be allocated immediately owing to inadequate data for sharing of the amount.

Money in the 'Holding Account' is to be held for a period of 7 years.<sup>219</sup> However, where the above enumerated circumstances cease or the persons entitled to the money in the account become known within this period,<sup>220</sup> the CMO is under a duty to distribute the money in the account based on the best available data.<sup>221</sup> At the expiration of the 'holding period' money in the 'Holding Account' would fall into the CMOs' general revenue as distributable income.<sup>222</sup>

### 3.5.6 Relationship between CMOs and users

The focus here is on the provisions relating to licensing practices and tariff setting of collecting societies. According to Adewopo, licensing and tariff setting do 'not only constitute the paramount objective but are also of utmost importance in [collective management] and functioning of copyright system such that it requires a scrupulous observance of extant regulations as well as best practice that is carefully adapted and conducive to the needs and conditions of the local environment'.<sup>223</sup> Licensing and tariff setting are a process involving preparation of tariffs by CMOs, negotiations with prospective users, resolution of any conflict arising from the negotiation and authorisation of uses by CMOs after resolution of the licensing and tariff issues.<sup>224</sup> Specifically, from a competition law perspective, the issues are whether CMOs have a right to refuse to license users; and whether CMOs can set excessive and discriminatory royalties, among others? These questions will be addressed below.

#### 3.5.6.1 *Licensing practice*

The CMO Regulations imposes a duty to license on CMOs and they are obligated to make their complete repertoire available to users on non-discriminatory terms.<sup>225</sup>

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<sup>219</sup> Regulation 12(1)

<sup>220</sup> Ibid.

<sup>221</sup> Regulation 11(2)

<sup>222</sup> Regulation 12(2).

<sup>223</sup> Adewopo op cit note 114.

<sup>224</sup> Ibid.

<sup>225</sup> Regulation 13(1).

According to Olubiyi and Adam, this may be interpreted to mean imposition of blanket licensing on CMOs by the CMO Regulations.<sup>226</sup> However, a better interpretation is that the CMO Regulations requires CMOs to place all the works in their repertoire before users who should have the choice of either transactional or blanket licensing. Whatever the meaning, the aim of this provision is to enable users to identify the works within the repertoire of the CMO concerned and to prevent CMOs from granting licenses on discriminatory terms.

The view has been rightly expressed that refusal to license on the part of CMOs is not an important issue in practice.<sup>227</sup> Conflict mostly ‘arise with regard to excessive or discriminatory royalty rates’.<sup>228</sup> This is because CMOs ‘have an interest in licensing. They want to license as much as possible, but at high royalty rates’.<sup>229</sup> However, ‘without a duty to license, they can retain license with the objective of increasing their bargaining power against users. Conversely, the recognition of a duty to license reduces the bargaining power of [CMOs] as dominant undertaking quite considerably’.<sup>230</sup>

CMOs are prohibited from discriminating in the grant of licenses to users of the same class either in terms of such license or differential tariff rates.<sup>231</sup> Based on the circumstances peculiar to a particular user, CMOs may be reasonably justifiable in applying differential tariffs to users of the same class.<sup>232</sup> From the tenor of the CMO Regulations, it can be taken for granted that CMOs may apply differential tariffs to users of different classes. Finally, CMOs are prohibited from inducing users to refrain from completing a licensing agreement with another CMO or copyright owner.<sup>233</sup>

### 3.5.6.2 *Tariff setting*

The CMO Regulations empower CMOs to set tariffs in respect of the royalties they demand for the use of the works in their repertoire.<sup>234</sup> In setting up tariffs, CMOs are enjoined to take into consideration the monetary advantage obtained from the exploitation of the work by the user and the value of the work. Other factors to be

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<sup>226</sup> IA Olubiyi and KI Adams ‘An examination of the adequacy of the regulation of collecting societies in Nigeria (2017) 5 *SAIPLJ* 87-112, 107.

<sup>227</sup> Drexl op cit note 164 at 262.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Regulation 17(1)(d).

<sup>232</sup> Ibid.

<sup>233</sup> Regulation 17(1)(e).

<sup>234</sup> Regulation 13(2).

considered are the purpose for which, and the context in which, the work is used; manner or kind of use of the work; proportion of the use of a work in the context of exploitation; any relevant decision of the Federal High Court (FHC) or the Dispute Resolution Panel (DRP); among others.<sup>235</sup>

While CMOs are empowered to set tariffs, they are enjoined to subject such tariffs to agreement between them and user groups for the use of copyright works by members of the user groups.<sup>236</sup> Further, CMOs are obligated to notify the NCC of the tariff as agreed upon by the user group.<sup>237</sup> However, it appears that where no agreement is reached between the CMO and a user, the NCC may refer the matter to the Dispute Resolution Panel for possible amicable resolution. In resolving such matters, the Dispute Resolution Panel is obliged to consider any previous agreement on tariff/licensing between the parties.<sup>238</sup> Failure to reach an amicable resolution despite referral of the dispute to the Dispute Resolution Panel does not in itself conclude the matter. It is opined that any of the parties may refer the dispute to the FHC because, as contended in 3.5.9 below, creation of the Dispute Resolution Panel does not take away the initial general jurisdiction of the FHC under the Nigerian Copyright Act.

The foregoing provisions were at the heart of the royalty controversy between COSON and members of the broadcasting industry in Nigeria. Plans by the NCC to set up a Dispute Resolution Panel to determine the tariff between the parties did not materialise because the controversy was eventually resolved sometime in 2014 following agreement on the acceptable tariff between COSON and the umbrella body of the broadcasting industry: Broadcasting Organisation of Nigeria (BON). Detailed discussion of the fallouts of the controversy is beyond the scope of this work.<sup>239</sup> Suffice it note that similar issues arose between COSON and MTN Nigerian Communications Ltd (MTNN) resulting in a suit filed at the FHC.<sup>240</sup> Interestingly, before the court could proceed with the trial, both parties settled the matter out of court after agreeing on an acceptable tariff structure.<sup>241</sup> Again, a detailed account of the events is beyond the scope of this work. However, both incidence indicate the importance of subjecting

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<sup>235</sup> Regulation 13(3)(a)-(g).

<sup>236</sup> Regulation 13(4).

<sup>237</sup> Regulation 13(5).

<sup>238</sup> See *COSON v NTA-Star TV Network*, unreported Case NO. NCC/DRP/001/2016 (23 December 2016)

<sup>239</sup> Adewopo op cit note 114.

<sup>240</sup> *COSON v. MTN Nigeria Communications Limited*, unreported (FHC/L/CS/619/2016).

<sup>241</sup> J Onyido 'Copyright collective rights management in Nigeria' (2017) *The Copyright Lawyer* 1-3.

proposed licensing tariff structure to agreement between CMOs and the target class of users.

Finally, CMOs are obligated to inform users of any planned change in tariffs.<sup>242</sup> Also, users are entitled to compensation or refund where they are unable to utilise a license granted by a CMO. The user must show that such inability resulted from negligence, misrepresentation or the fault of the CMO involved.<sup>243</sup> Such situation may arise, for instance, where a CMO authorises a user, through a blanket license, to use a work not forming part of the CMO's repertoire and the user is prevented by way of a copyright claim by the actual owner of copyright in the work.

### **3.5.7 Relationship among CMOs**

The CMO Regulations also govern the relationship among CMOs. It prohibits one CMO from withholding information, which is reasonably required for effective collective management by another CMO.<sup>244</sup> Such information include those regarding the repertoire of an author who has assigned his/her works to both CMOs; that may assist the other CMO in computation and equitable distribution of royalties; and on any existing reciprocal agreement of a CMO.<sup>245</sup>

The CMO regulations prohibit a CMO from using information obtained from another CMO for a purpose outside collective management.<sup>246</sup> Finally, CMOs are prohibited from doing anything that has the effect of preventing another CMO from undertaking its functions.<sup>247</sup> There is no express prohibition of concerted efforts by CMOs aimed at obtaining high tariffs from users or controlling the copyright market. However, it is highly doubtful whether the Nigerian copyright regulatory framework is best suited to address such issue. Discussion in chapter five will attempt to answer this issue under consideration of competition law principles.<sup>248</sup>

### **3.5.8 Internal management, transparency and accountability**

The CMO Regulations make provisions aimed at ensuring transparency and accountability on the part of CMOs. They are required to have two decision-making

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<sup>242</sup> Regulation 7(4).

<sup>243</sup> Regulation 16.

<sup>244</sup> Regulation 17(1)(f)

<sup>245</sup> Regulation 17(1)(f)(i)-(iii)

<sup>246</sup> Regulation 17(1)(g)

<sup>247</sup> Regulation 17(1)(h)

<sup>248</sup> Mergers and acquisitions in Nigeria are governed by the Investment and Security Act No. 29, 2007 and CAMA.

organs – a governing board and a general assembly.<sup>249</sup> While the general assembly comprises all members of the CMOs, the governing board is required to – as far as possible – be representative of the different classes of copyright owners in a CMO.<sup>250</sup> The respective roles of both organs in CMOs have been adequately addressed elsewhere.<sup>251</sup> Without doubt, the objective here is to ensure that copyright owners are in charge of the decision making in CMOs.

The CMO Regulations do not make express provisions on convening of meetings by CMOs. It only requires CMOs to keep a special register of the minutes of meetings of their governing boards and general assemblies. The certified copies of the minutes are to be submitted to the NCC where the NCC requires it.<sup>252</sup> The provisions of CAMA can fill the gap created by the silence of the CMO Regulations on convening of meetings. The reason for this cannot be far-fetched. CMOs are incorporated as companies limited by guarantee under CAMA. As such, they are obligated to comply with the corporate governance rules provided by CAMA, including those relating to meetings of companies limited by guarantee.<sup>253</sup>

CMOs are required to make certain filings with the NCC. These filings are in form of annual returns; general report of activities; and audited financial report, which must include the total revenue, total expenditure and royalty payments to members in line with the CMO's distribution plan.<sup>254</sup> CMOs are required to, within 30 days of occurrence, notify the NCC of any alteration to their standard membership agreements; memorandum and articles of association or any internal rules; any reciprocal agreements; and judicial or official decision involving CMOs.<sup>255</sup> The foregoing provision does not preclude CMOs from complying with the provisions of CAMA relating to filing of annual returns.<sup>256</sup>

Moreover, copyright users and other members of the public are entitled to obtain information from CMOs upon written requests. The CMO Regulations obligate CMOs to provide reasonable information on their services. The information should

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<sup>249</sup> Regulation 1(3)(b)

<sup>250</sup> Regulation 5(3)

<sup>251</sup> Baloyi and Hooijer op cit note 125.

<sup>252</sup> Regulation 8

<sup>253</sup> see CAMA, ss211-243. For general discussion of the corporate governance implications of CMOs in Nigeria, see CI Okorie, 'Corporate governance of collecting societies in Nigeria: powers of the copyright sector regulator' (2018) 6 *SAIPLJ* 24.

<sup>254</sup> Regulation 7(2).

<sup>255</sup> Regulation 7(1)

<sup>256</sup> CAMA, ss370, 373-378



include the description of the classes of rights administered by the CMOs; the tariffs, terms and conditions of license for all categories of users; among others. For this purpose, CMOs are prohibited from knowingly making false representations in respect of any matter for which information is required.<sup>257</sup>

To ensure accountability, CMOs are required to keep proper accounting records. Where necessary, the NCC may appoint auditors to audit the accounts of CMOs, at the expense of the CMOs. If the audit reveals the commission of an offence by the CMO or any of its officials, the NCC is empowered to initiate criminal proceedings against such CMO or its officials.<sup>258</sup> Whether the NCC's power to initiate criminal proceedings in this regard extends to prosecution of the criminal proceedings will depend on the nature of the crime committed. Pursuant to s38(3) of the Nigerian Copyright Act, the NCC may prosecute, through its copyright inspectors, if the act in question qualifies as an offence under the Nigerian Copyright Act or the CMO Regulations. However, where the offence committed is financial in nature, the NCC would not be able to prosecute such offence. The mandate of the NCC under the Nigerian Copyright Act does not extend to prosecution of financial crimes. In such circumstance, the NCC's power to 'initiation criminal proceedings' will be limited to filing a complaint to, and assisting, the relevant authority saddled with the duty of prosecuting financial crimes. Even so, an officer indicted of such offence must be suspended immediately by the CMO.<sup>259</sup>

### **3.5.9 Dispute resolution**

In the course of collective management, disputes may arise between different CMOs; between CMOs and copyright owners; between different copyright owners; between copyright owners and users; and between users and collecting societies as the case may be. The CMO Regulations makes provision for dispute resolution mechanism in the form of alternative dispute resolution (ADR). Specifically, reg.14 of the CMO Regulations requires disputes to be referred to the NCC, which may set up a Dispute Resolution Panel to settle the dispute. The Dispute Resolution Panel is to conduct its proceedings in line with the Copyright (Dispute Resolution Panel) Rules, 2007 (DRP Rules). However, such dispute must arise from any matter falling within the ambit of

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<sup>257</sup> Regulation 7(3).

<sup>258</sup> Regulation 9(1)-(3).

<sup>259</sup> Regulation 9(4).

the CMO Regulations, especially in relation to tariff setting,<sup>260</sup> licensing agreements, royalty collection and distribution, and the conduct of one CMO in relation to another CMO.

The above provision appears to make it mandatory for parties to a dispute to submit, at first instance, such dispute to the NCC for onward referral to the Dispute Resolution Panel. Rule 5 of the DRP Rules reinforces this point. Rule 5 of the DRP Rules empowers the NCC's Director-General to direct parties to a dispute referred to the NCC to cease further proceedings. In effect, the reg.14 and the DRP Rules may foreclose the rights of aggrieved persons to seek redress in court. In this regard, the CMO Regulations seems to conflict with the Nigerian Copyright Act, which stipulates the FHC as the court of first instance for resolution of disputes relating to copyright.<sup>261</sup>

However, another view is that there is no conflict between reg.14 and the Nigerian Copyright Act. Although couched in mandatory terms, reg.14 may be regarded as permissive. This is because in enabling the NCC to make rules under the Nigerian Copyright Act, the legislators could not be deemed to have empowered the NCC to amend or repeal any provision of the Nigerian Copyright Act. The CMO Regulations is a creation of the Nigerian Copyright Act, hence it cannot attempt to override or give an impression of overriding the Nigerian Copyright Act.<sup>262</sup> Thus, parties are at liberty to proceed directly to the FHC in the event of disputes and they will not be deemed to have contravened reg.14.

Even so, the FHC would be willing to stay proceedings in a matter before it for compliance with reg14 upon proper application by any of the parties. This is so, not because bypassing reg.14 will affect the court's jurisdiction, but because the courts are inclined to promoting ADR, especially where such mechanism exists. In any case, an award from the Dispute Resolution Panel does not prevent parties from approaching the FHC as a court of first instance. According to Adewopo, reg.14 is made 'with possible recourse to court, by either or both parties, for judicial review, if the need arises'.<sup>263</sup>

Regulation 14 is not without some value. First, as an ADR mechanism, it will afford a faster and less cumbersome procedure for the resolution of disputes in the

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<sup>260</sup> Adewopo op cit note 114.

<sup>261</sup> Nigerian Copyright Act, s46.

<sup>262</sup> Opadere op cit note 74 at 308.

<sup>263</sup> Adewopo op cit note 114.

Nigerian collective management system. Secondly, it makes it possible for the parties to be actively involved in the dispute resolution process. Thirdly, it is presumed that the NCC will not appoint non-experts to make up a Dispute Resolution Panel. Consequently, the awards delivered by the Dispute Resolution Panel could help to enrich the jurisprudence on collective management in Nigeria since the awards may serve as references in disputes on collective management before the FHC.

### **3.6 Conclusion**

The Nigerian regulatory framework for CMOs has been the focus of the discussion in this chapter. Legislative, judicial and administrative developments on collective management in Nigeria were examined and appropriate recommendations made where necessary. The main focus is on how the regulatory framework governs the relationship between CMOs and copyright owners; CMOs and users; and among CMOs themselves. In this regard, issues concerning royalty distribution, membership of and assignment of rights to CMOs, CMOs' powers to grant or refuse license to users, and the fixing of royalty rates were particularly discussed.

Essentially, the aim of the foregoing discussions is to lay the foundation for a determination, in chapter five, of whether the Nigerian regulatory framework for CMOs empowers the NCC to address the CMOs' competition concerns identified in 2.4.3 above. In a similar vein, the next chapter will focus on the regulation of CMOs in South Africa

## **CHAPTER FOUR: REGULATION OF COLLECTIVE MANAGEMENT ORGANISATIONS IN SOUTH AFRICA**

### **4.1 Introduction**

This chapter examines the regulation of CMOs in South Africa. Principally, the regulatory framework for CMOs in South Africa is found in the SA Copyright Act, Performers Protection Act and the CS regulations. The provisions of the Companies Act relating to incorporation, corporate governance, winding-up and establishment of the Companies and Intellectual Property Commission (CIPC) would also be relevant in this kind of discourse. The goal in this chapter is to determine if the regulatory issues highlighted in chapter two are covered in the South African regulatory framework. Discussion in this chapter will be very useful in determining whether the South African regulatory framework empowers the CIPC to address the CMOs' competition concerns in the next chapter.

### **4.2 Emergence of collective management in South Africa**

The emergence of collective management in South Africa up to 2014 has been extensively discussed elsewhere<sup>1</sup> and it suffices here to highlight some main points and major developments before and after 2014. Like Nigeria, the growth of CMOs in South Africa is rooted in the UK and it began in the field of music. In 1925, Performing Rights Society (PRS) appointed law firms as agents in the Southern African Development Community countries then under the UK's control (UK's SADC)<sup>2</sup> with the chief agent – the firm of Ivan Christian Silberbauer – based in South Africa.<sup>3</sup>

The Southern African Music Rights Organisation (SAMRO) was formed in 1961 as the South African Society of Composers, Authors and Music Publishers (SAFCA) by Dr. Gideon Roos Snr. (a former DG of South African Broadcasting Corporation – SABC) with significant help from PRS, which, along with some other of its members, constituted SAMRO's first membership base.<sup>4</sup> SAMRO's operation

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<sup>1</sup> J Baloyi and T Pistorius 'Collective Management in Africa' in D Gervais (ed.) 3rd ed. *Collective Management of Copyright and Related Rights* (2015) 369-424, 374-397.

<sup>2</sup> South Africa, Namibia, Lesotho and Swaziland.

<sup>3</sup> Baloyi and Pistorius op cit note 1 at 384.

<sup>4</sup> Ibid.

permeated the entire UK's SADC, until recently with some of the countries in the region developing their own CMOs. The original name – SAFCA – was dropped in 1966 following conflict with the name of another organisation then operating in the South African music industry. SAMRO then became known as the South African Music Rights Organisation. However, this was later changed to the current name to reflect the reach of its operations.<sup>5</sup> SAMRO changed its legal status from company limited by guarantee to a non-profit company under the Companies Act from 1 May 2013.<sup>6</sup> This may not be unconnected to the recommendation of the Copyright Review Commission (CRC) that 'SAMRO should amend its constitutive document in order to be aligned with the [Companies Act] and acceptable standards of corporate governance'.<sup>7</sup> The CRC was established on 18 November 2010 by the Minister of Trade and Industry 'to assess concerns and allegations about the [CMOs'] model [...] in place for the distribution of royalties to musicians and composers of music' in South Africa.<sup>8</sup> Specifically, the issues considered by the CRC included the structure of CMOs, licensing, royalty collection and distribution, among others. Major findings and recommendations of the CRC will be highlighted as the chapter progresses.

Although formed mainly to administer the performing rights of its members, SAMRO at some point attempted to include mechanical rights of its members within its administration. This caused some conflict between SAMRO and UK's Mechanical Copyright Protection Society (MCPS), which was then administering mechanical rights in South Africa. Both SAMRO and MCPS came to an understanding which limited SAMRO's activities in this area to 'mechanical licensing of the Department of Information'.<sup>9</sup>

With the help of MCPS, the South African Recording Rights Association Limited (SARRAL) was established in 1963 by George Hardy.<sup>10</sup> SARRAL then became the main CMO administering mechanical rights in South Africa. Its

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<sup>5</sup> Ibid.

<sup>6</sup> N Motsatse 'SAMRO Corporate Form Conversion' available at

<http://samro.org.za/news/articles/samro-corporate-form-conversion>, accessed 27 June 2018.

<sup>7</sup> Department of Trade and Investment (DTI) *Copyright Review Commission Report* (2011) 53

<sup>8</sup> Ibid at 7. The CRC consisted of the Honourable Mr. Justice IG Farlam as chairperson, Mr. Oupa Lebogo, Mr. Nala Mhlango, Prof. Tana Pistorius, Dr. Jean Swanson-Jacobs and Prof. Musa Xulu.

<sup>9</sup> Baloyi and Pistorius op cit note 1 at 375.

<sup>10</sup> G Gilfillan 'Clarifying the history, roles, responsibilities and regulatory environment concerning collecting societies in South Africa' (2010) 11 available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2010/101020clarifying.pdf> accessed on 7 March 2017.

membership was made up of ‘MCPS, Chappell and some key local publishers’.<sup>11</sup> After its formation, SARRAL began to face difficulties at different times until its demise through a winding-up order in 2009.<sup>12</sup> First, SARRAL had difficulty obtaining assignments from composers, authors and publishers who already had confidence in SAMRO. Thus, SARRAL had to come to an arrangement with SAMRO, whereby SAMRO got assignments of mechanical rights from the composers, authors and publishers and then sub-assigned same to SARRAL to manage. Secondly, the advent of recording companies in the area of music publishing through the purchase of publishing companies influenced the creation of the National Organisation for Reproduction Rights in Music in South Africa (NORM) in 1971, which administered mechanical rights of the ‘record-label aligned publishers’.<sup>13</sup> This led to a drastic decrease in SARRAL’s membership. SARRAL’s existence was greatly threatened until MCPS, Society for the Administration of Mechanical Rights (SDRM - France), Society of Authors, Composers and Publishers of Music (SACEM – France) and GEMA (Germany) came to its rescue and it was then reorganised and repositioned. Even so, SARRAL’s membership became largely constituted of composers, authors and small publishers until it was liquidated.<sup>14</sup>

The demise of SARRAL paved the way for negotiations between SAMRO and NORM which began in 2011,<sup>15</sup> and led to the formation of CAPASSO as a non-profit company in 2014.<sup>16</sup> CAPASSO, which was initially to be known as Composers, Authors and Publishers Association of South Africa (CAPASA),<sup>17</sup> is now the only CMO administering musical mechanical rights in South Africa. The CRC report<sup>18</sup> gave vent to the negotiations between SAMRO and NORM for the formation of CAPASSO.<sup>19</sup> In its report, the CRC recommended the implementation of ‘one society one right’ for collective management in South Africa, on the basis of which it

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<sup>11</sup> Baloyi and Pistorius op cit note 1.

<sup>12</sup> *Shapiro v SARRAL*, unreported case no 14698/04 (6 November 2009).

<sup>13</sup> Ibid.

<sup>14</sup> Baloyi and Pistorius op cit note 1.

<sup>15</sup> D Coetzer ‘Two of South African Largest Royalty Collection Agencies Join Forces’ (2011) available at <http://www.billboard.com/biz/articles/news/publishing/1178131/two-of-south-africas-largest-royalty-collection-agencies-join>, accessed on 18 September 2017.

<sup>16</sup> CAPASSO’s Memorandum of Incorporation, Article 3 available at <http://www.capasso.co.za/index.php/company-documents.html>, accessed on 18 September 2017; CAPASSO ‘Our History’ available at <http://www.capasso.co.za/index.php/about-us/our-history.html>, accessed on 18 September 2017.

<sup>17</sup> Coetzer op cit note 16.

<sup>18</sup> Op cit note 7.

<sup>19</sup> CAPASSO ‘Our History’ op cit note 17.

recommended the merger of SAMRO's mechanical rights arm and NORM to form one mechanical rights society.<sup>20</sup>

CMOs did not emerge in the area of needletime rights, until about 2008 when SAMPRA was formed by the Recording industry of South Africa (RiSA).<sup>21</sup> Needletime rights are the rights of performers and music producers to be remunerated when their sound recording (containing the performers' performance) is broadcast, transmitted in a diffusion service or communicated to the public.<sup>22</sup> RiSA, formed in the 1970s, is a trade association of about 3000 members including the major music producers in South Africa. It collects royalties in respect of music videos from broadcasters through RiSA Audio Visual (RAV), which it created in 2000.<sup>23</sup> In essence, SAMPRA's membership base consists of music producers. The late entry of needletime CMOs in South Africa was occasioned by the long history behind the legal recognition of needletime rights in South Africa, which will be discussed in the next section. For now, it should be noted that, in 1949, the SABC entered an agreement with the International Federation of the Phonographic Industry (IFPI) 'whereby the SABC would pay the IFPI a fee per side of a record used in a "spot" programme'.<sup>24</sup> The agreement lasted till 1965 when needletime rights were expunged by the repealed Copyright Act, No 63 of 1965 (1965 Copyright Act).<sup>25</sup>

In 2009, SAMRO sojourned into the needletime arena through the Performers' Organisation of South Africa Trust (POSA).<sup>26</sup> POSA was established as a trust to administer the needletime rights of performers who are members of SAMRO.<sup>27</sup> The requirements of the SA Copyright Act and Performers Protection Act for sharing of needletime royalties between producers and performers; the resultant conflict as to the appropriate share of royalties for performers; and the need to resolve this conflict led to the creation of the new SAMPRA incorporated as a non-profit company in 2016.<sup>28</sup>

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<sup>20</sup> DTI op cit note 7 at 46.

<sup>21</sup> Gilfillan op cit note 10.

<sup>22</sup> DTI, op cit at 17.

<sup>23</sup> Universal Music, Sony Music and Warner Music: RiSA 'About us' available at <http://www.risa.org.za/about-us/>, accessed on 8 September 2017; RAV 'About us' available at [http://www.rav.org.za/about\\_us](http://www.rav.org.za/about_us), accessed on 8 September 2017.

<sup>24</sup> D du Plessis 'Performing Rights – part 2' (2008) available at [https://www.samptra.org.za/downloads/asa\\_oct\\_08.pdf](https://www.samptra.org.za/downloads/asa_oct_08.pdf), accessed on 18 September 2017.

<sup>25</sup> Ibid.

<sup>26</sup> Baloyi and Pistorius op cit note 1 at 396.

<sup>27</sup> POSA 'Needletime Rights' available at <http://www.posatrust.org.za/>, accessed on 18 September 2017.

<sup>28</sup> SAMPRA's Memorandum of Incorporation (MOI), Article 3 available at <https://www.samptra.org.za/pdf/moi/SAMPRA%20Memorandum%20of%20Incorporation.pdf>, accessed

The provisions of the SA Copyright Act and Performers Protection Act and the conflict will be discussed in the course of this chapter.

The new SAMPRA is a merger between SAMPRA and POSA following a cooperation and settlement agreement reached in 2014 between the two CMOs. The new SAMPRA now has two chambers: the performers' chamber (constituted by POSA) and the copyright owners' chamber (constituted by SAMPRA). Both chambers are each entitled to appoint six directors to the board of the new SAMPRA, which comprises 13 directors including the chief executive officer.<sup>29</sup> The CRC's recommendation for the merger of SAMPRA and 'SAMRO's needletime unit to form one [CMO] for needletime' was further impetus for the negotiation between SAMPRA and SAMRO.<sup>30</sup> Moreover, being that SAMPRA was historically accredited to administer needletime rights for music producers, the new entity took its name.<sup>31</sup>

The Independent Music Performance Rights Association (IMPRA) is another CMO in the area of needletime rights administration in South Africa. It was formed in 2014 as the CMO for the needletime rights in sound recordings belonging to local independent performers and music producers. Its membership includes performers and producers belonging to Music Performers Association of South Africa (MPASA), Association of Independent Record Companies of South Africa (AIRCO) and Kwazulu Natal Music Industry (KUMISA), among others.<sup>32</sup>

The Dramatic, Artistic and Literary Rights Organisation (DALRO), the only CMO for rights in literary, artistic and dramatic works in South Africa, was established in 1967 as a private company by SAMRO.<sup>33</sup> SAMRO is its sole shareholder, but it has publishers, authors and artists on its board. It has mandating agreements, on a non-exclusive basis, with publishers in South Africa. It may appear unusual for SAMRO to solely own DALRO since CMOs are supposed to be associations of copyright owners. Technically, however, there is nothing wrong in this practice because it is possible to

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on 14 September 2017. SAMPRA 'Background' available at <https://www.sampra.org.za/>, accessed on 18 September 2017.

<sup>29</sup> SAMPRA's MOI, *ibid*.

<sup>30</sup> DTI op cit note 7 at 46.

<sup>31</sup> SAMRO 'Integrated Report 2016' 11 available at [http://www.samro.org.za/sites/default/files/SAMRO\\_IR\\_10070\\_\\_1Nov\\_V4e\\_LN\\_FinalWebDocument%20%281%29.pdf](http://www.samro.org.za/sites/default/files/SAMRO_IR_10070__1Nov_V4e_LN_FinalWebDocument%20%281%29.pdf), accessed on 14 September 2017.

<sup>32</sup> IMPRA 'Background/History of IMPRA' available at <https://www.impra.co.za/history/>, accessed on 18 September 2017.

<sup>33</sup> Baloyi and Pistorius op cit note 1 at 394. E Gray and M Seeber *PICC Report on Intellectual Property Rights in the Print Industry Sector* (2004) available at [http://www.publishsa.co.za/downloads/intellectual\\_property\\_report.pdf](http://www.publishsa.co.za/downloads/intellectual_property_report.pdf), accessed on 7 March 2017.



have a CMO established as a licensing agency by an individual or corporate entity insofar as such CMO operates with the mandate of relevant copyright owners and has copyright owners as part of its decision-making process.<sup>34</sup> It may also appear out of place for DALRO's mandate to come from publishers and not from the actual creators or authors of the literary works. But, if it is recalled that authors usually enter into personal contracts transferring their economic rights to publishers then it will become clear that DALRO's practise of getting mandate from publishers is not unsupportable. The only snag will be if the authors do not transfer the rights in their works to publishers. In such cases, DALRO will have to deal directly with the authors concerned.<sup>35</sup>

Finally, there is the Motion Picture Licencing Company (MPLC), which was established in 1996 in the United States of America (USA) to administer the rights of producers and distributors in Hollywood. It has extended its operations to South Africa and grants licenses for public performance rights in Hollywood movies.<sup>36</sup> There is also the Christian Copyright Licencing International (CCLI) – a US CMO – that started granting licenses to churches in South Africa for Christian videos since 1995.<sup>37</sup> From the foregoing, the following represents the current state of CMOs in South Africa:

**Table 1: Summary of collecting societies in South Africa**

Field of operation		CMO	Membership	Year formed
Music	Performing Rights	SAMRO	Composers, authors and publishers	1961
	Mechanical Rights	CAPASSO	Composers, authors, and publishers (members of SAMRO)	2014
	Needletime Rights	The new SAMPRA (merger of SAMPRA and POSA).	Members of RiSA and members of SAMRO.	2016
		IMPRA	2. Independent music producers and performers	2014
Publishing/Print and Visual Arts		DALRO	Academic/education publishers and	1967

<sup>34</sup> M Ficsor *Collective Management of Copyright and Related Rights* (2002) 22.

<sup>35</sup> DTI op cit note 7 at 70.

<sup>36</sup> See <http://mplcsa.org/page/about-the-mplc>, accessed on 7 March 2017.

<sup>37</sup> See <http://www.za.ccli.com/about-us/>, accessed on 7 March 2017.

			newspaper/magazine publishers	
Audio-visual		MPLC	Publishers and distributors in Hollywood.	1996 (in USA).
		CCLI	Producers and Distributors of Christian videos	Started licensing in South Africa in 1995.
		RAV	RiSA	2000.

### 4.3 Legislative history of the regulatory framework

The first national copyright legislation in South Africa, contained in Schedule III of the Patent, Designs, Trade Marks and Copyright Act,<sup>38</sup> did not make provisions for the regulation of CMOs. Essentially, Schedule III comprised the entire provision of the British Copyright Act 1911 (Imperial Copyright Act).

The situation changed with the enactment of the defunct 1965 Copyright Act. Among other things, chapter 4 of the 1965 Copyright Act created the Copyright Tribunal and empowered it to grant compulsory licenses, among others, where a licensing body had failed or refused to grant such licenses. The chapter was modelled after the British Copyright Act of 1956, which was inapplicable in South Africa. According to the CRC report, the ‘British parliament had set up a tribunal, originally known as the Performing Rights Tribunal, to provide a remedy for major copyright users who had complained about the terms on which performing rights societies were doing business’.<sup>39</sup> In effect, chapter 4 of the 1965 Copyright Act was meant mainly to regulate the licensing practice of CMOs.

However, chapter 4 of the 1965 Copyright Act was never applied to the existing CMOs. The only reported case in which it was applied involved some local opera and dramatic practitioners and owners of copyright in some musical dramas. The local practitioners had sought a license to perform the musical dramas, which was refused by the copyright owners because the local practitioners were going to perform the musical dramas before a segregated audience. South Africa was then under the Apartheid regime. Relying on its powers under chapter 4, particularly s28 thereof, the

<sup>38</sup> No. 9 of 1916.

<sup>39</sup> DTI op cit note 7 at 16.

Copyright Tribunal granted the license.<sup>40</sup> Chapter 4 is the progenitor of the current chapter 3 of the SA Copyright Act, which has been considered recently in three reported cases,<sup>41</sup> which will be examined in 4.5.4 below.

Thus, for a long time, CMOs in South Africa were not subject to regulatory oversight. CMOs was only introduced into the regulatory lexicon in 2002,<sup>42</sup> when the needletime rights were reintroduced to the SA Copyright Act and Performers Protection Act. It was stated in the previous section above that the late foray of needletime CMOs into collective management in South Africa is linked to the history behind the legal recognition of needletime rights in South Africa. In effect, the history of the regulatory framework for CMOs in South Africa will be incomplete without a mention of how needletime rights emerged in South Africa.

Accordingly, the needletime right was originally recognised in the Imperial Copyright Act.<sup>43</sup> However, it was not provided for under the 1965 Copyright Act.<sup>44</sup> According to Dean, the needletime right was proposed in the Bill from which the 1965 Copyright Act was enacted. The proposal for the needletime right was, however, abandoned on the floor of parliament owing to the lobbying of the SABC, which was strongly opposed to the recognition of the right.<sup>45</sup> However, an official report claimed that the removal of needletime rights from the 1965 Copyright Act was due ‘to the alleged existing abuse of rights and an intractable attitude of the record industry to agree to a reasonable royalty rate’.<sup>46</sup> According to the official report, the SABC opposed the inclusion of the needletime right on the ground that the promotional value of broadcasting was sufficient compensation instead of royalties.<sup>47</sup> On their part, the record industry believed that the promotional value of broadcasting should rather be taken into account when negotiating licenses.<sup>48</sup> Whatever may be the reason, the effect

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<sup>40</sup> *Johannesburg Operatic and Dramatic Society v Music Theatre International* (1969) 2 Patent Journal, 223; JH Spier ‘In re Johannesburg Operatic and Dramatic Society v Music Theatre International: Boycott of the South African Stage’ (1970) 20 *CLS* 140-153; JR Steyn ‘Copyright tribunal’s first case’ (1969) *De Rebus* 69.

<sup>41</sup> *Foschini v SAMPRO* [2013] ZAGPPHC 304; *NAB v SAMPRO* [2014] ZASCA 10; *SAMPRO v Foschini* [2015] ZASCA 188.

<sup>42</sup> The Copyright Amendment Act, No 9 of 2002 (CAA), s1(a).

<sup>43</sup> *Gramophone Co. Ltd v Cowardine* (1934) Ch 450.

<sup>44</sup> *NAB v SAMPRO* note 42, para 1.

<sup>45</sup> O Dean ‘Sound recordings in South Africa: the Cinderella of the copyright family’ (1993) *De Rebus* 913-917.

<sup>46</sup> Standing Committee on the Copyright Act ‘Report on the Needle Time and Blank Tape Levy’ (1993), cited in DTI op cit note 7 at 10.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

of the absence of the needletime right from the 1965 Copyright Act was that the owners of copyright in sound recordings could only enjoy mechanical rights.<sup>49</sup> This situation persisted under the SA Copyright Act. Efforts to reintroduce the needletime right in 1993 also failed.<sup>50</sup> However, renewed attempts for reintroduction of the needletime right paid off in 2002 following the recommendations of the Music Industry Task Team (MITT). According to the Supreme Court of Appeal (SCA), ‘lobbying by musicians, performers and the recording industry’<sup>51</sup> was very instrumental to the reintroduction of needletime rights.

The MITT was set up by the then Minister of Arts, Culture, Science and Technology ‘in response to expression of problems within the music industry by musicians and their representative organisations’.<sup>52</sup> After its hearings and deliberations, the MITT made several findings including that the copyright legislation, particularly with regards to needletime rights, was inadequate and outdated.<sup>53</sup> It, therefore, recommended that the draft amendment by the Standing Committee on the Copyright Act (Standing committee) regarding needletime rights be implemented without delay.<sup>54</sup> It should be recalled that the Standing committee had in 1995 acted as a commission of enquiry, solicited public opinion on the reintroduction of needletime rights and recommended the draft amendment.<sup>55</sup> The Copyright Amendment Act (CAA)<sup>56</sup> and the Performers Protection Amendment Act, No 8 of 2002 (PPAA) were based on the draft amendment. Among others, the CAA substituted the initial s9 with the extant s9, and introduced ss9A and 39(cA) to the SA Copyright Act,<sup>57</sup> while the PPAA introduced the extant s5 to the Performers Protection Act.<sup>58</sup>

In addition to mechanical and rental rights, s9 SA Copyright Act recognises music producers’ needletime rights to broadcast, transmit through a diffusion service and communicate the sound recordings produced by them to the public (needletime rights). The section also confers exclusive rights on music producers to authorise any

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<sup>49</sup> Dean op cit note 45.

<sup>50</sup> Ibid; DTI op cit note 7 at 10.

<sup>51</sup> *NAB v SAMPRO* supra note 41, para 9.

<sup>52</sup> Department of Arts, Culture, Science and Technology (DAC) ‘Music Industry Task Team Report’ (2001) 1

<sup>53</sup> Ibid 3.

<sup>54</sup> Ibid 5.

<sup>55</sup> DTI op cit note 7 at 11.

<sup>56</sup> Supra note 42.

<sup>57</sup> Copyright (Amendment) Act, ss3 and 4.

<sup>58</sup> Performers Protection (Amendment) Act, s3.

person to carry out any of the aforementioned acts in respect of their sound recordings. In terms of s9A, no person is allowed to broadcast, transmit through a diffusion service or communicate a sound recording to the public without payment of royalty to the music producer, unless otherwise agreed. In the same vein, s5 Performers Protection Act recognises the right of performers to be remunerated for the broadcast, transmission through a diffusion service and communication to the public of a sound recording containing their performance.

Further, ss9A SA Copyright Act and 5 Performers Protection Act require the amount of royalty payable to the music producer and the performer to be determined by agreement between the user of the sound recording, the music producer and/or the performer as the case may be; or between the user and the representative CMOs of the music producer and/or the performer as the case may be. Also, the SA Copyright Act and Performers Protection Act seem to recognise the practice in the music industry where performers authorise music producers to record their performances; and that pursuant to such authorisations, music producers may collect royalties from third parties using the sound recording embodying such performances. Thus, the SA Copyright Act and Performers Protection Act require royalties collected by music producers to be shared by the performer and the music producer. However, the performer's and music producer's share is to be determined by agreement between them or their respective CMOs.<sup>59</sup>

The framers of the draft amendments that led to the CAA and PPAA probably recognised the danger of allowing CMOs to exist almost unregulated. Hence, they introduced s39(cA). That section empowered the Minister (of Trade and Industry)<sup>60</sup> to make regulations 'in consultation with the Minister of Finance, providing for the establishment, composition, funding and functions of [CMOs] contemplated in [s9A], and any other matter that it may be necessary or expedient to regulate for the proper functioning of such [CMOs]'. The CS Regulations, which will be examined in the course of this chapter, was made pursuant to this section.

Being the CMOs contemplated under s9A, only needletime CMOs come under the regulatory framework provided by the CS Regulations.<sup>61</sup> Those administering mechanical rights, performing rights in music, reprographic rights and audio-visual

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<sup>59</sup> SA Copyright Act, s9A(2); Performers Protection Act, s5(4).

<sup>60</sup> SA Copyright Act, s1.

<sup>61</sup> Regulation 2.

rights (non-needletime CMOs) are not within the framework of the CS Regulations. However, they are subject to the scrutiny of the Copyright Tribunal in respect of licensing under chapter 3 SA Copyright Act and that of the CIPC under relevant provisions of the Companies Act. Further, after the introduction of the needletime right and the passage of the CS Regulations, it became apparent that sound recording producers and performers were not receiving their royalty as envisaged by the SA Copyright Act and Performers Protection Act. According to the CRC Report, the reason for this state of affairs was that the 'legislation, which provided for a statutory licence in respect of needletime, did not adequately protect the rights owners, whose rights were made subject to the licence'.<sup>62</sup> The foregoing motivated the CRC to recommend the enactment of a regulatory framework that covers all CMOs in South Africa, among others.<sup>63</sup> The proposed amendment in clause 25 of the Copyright Amendment Bill 2017 (CAB)<sup>64</sup> is influenced by this recommendation.<sup>65</sup> The proposed amendment will be discussed in more detail below. For ease of reference, and where necessary, a distinction will be made between the regulation of needletime and non-needletime CMOs under 4.5 below. To this end, and flowing from the discussion so far, CMOs in South Africa can be broadly classified into needletime and non-needletime CMOs. The new SAMPRA and IMPRA being needletime CMOs, while SAMRO, DALRO, CAPASSO, RAV, MPLC, and CCLI are non-needletime CMOs.

#### 4.4 Agencies regulating CMOs in South Africa

The CIPC is established, as a juristic person to function as an organ of state within the public administration of South Africa,<sup>66</sup> with the objective to ensure the efficient and effective registration of companies and IPRs; maintain accurate and up-to-date and relevant information concerning companies and IPRs, among others; promote

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<sup>62</sup> DTI op cit note 7 at 3.

<sup>63</sup> Ibid.

<sup>64</sup> [B13-2017] *GG No. 40121* of 5 July 2016. The clause seeks to introduce Chapter 1A comprising sections 22B-F dealing with collecting societies generally. The latest draft of the bill as of 15 June 2018 is available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/15062018\\_Copyright\\_Amendment\\_Bill\\_B\\_Bill\\_Draft\\_2\\_clean.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/15062018_Copyright_Amendment_Bill_B_Bill_Draft_2_clean.pdf), accessed 27 June 2018.

<sup>65</sup> DTI 'Copyright Amendment and Performers Protection Amendment Bills: Presentation to the Portfolio Committee of Arts and Culture' (16 May 2017) 7 available at <https://www.thedti.gov.za/parliament/2017/Copyright.pdf>, accessed on 29 September 2017

<sup>66</sup> Companies Act, s185.

education and awareness of company and IP laws; and promote compliance with, and the efficient, effective and widest possible enforcement of, the Companies Act and IP laws, among others.<sup>67</sup>

Pursuant to the foregoing powers, the CIPC supervises both needletime and non-needletime CMOs, in terms of relevant provisions of the SA Copyright Act, Performers Protection Act and the Companies Act generally. However, and in addition to other relevant provisions of the SA Copyright Act, Performers Protection Act and the Companies Act, the CIPC applies specific provisions of s9A SA Copyright Act, s5 Performers Protection Act and the CS Regulations only to non-needletime CMOs. The reason for this claim is not far-fetched. The CS Regulations is limited to needletime CMOs because s39cA, which empowers the Minister to make the regulation specifically refers to CMOs contemplated in s9A (needletime collecting societies). Further, since CMOs in South Africa are either non-profit companies or private companies (as shown in 4.2 above), the Companies Act apply to all CMOs on general issues relating to corporate governance, company formation, etc. Thus, the CIPC regulates all CMOs from the perspectives of corporate governance, and other general provisions of the SA Copyright Act, while its supervisory role on specific issues relating to collective management are limited to the CS Regulations which only apply to needletime CMOs.

For instance, and in relation to all CMOs, the Commissioner of the CIPC acts as Registrar, and certifies the orders, of the Copyright Tribunal under the SA Copyright Act.<sup>68</sup> Further, the Commissioner enforces relevant provisions of the Companies Act dealing with non-profit companies and private companies. Such relevant provisions of the Companies Act relate to incorporation, membership, accountability, company governance, winding-up, among others.<sup>69</sup> However, regarding needletime CMOs specifically, the CS Regulations stipulates the responsibilities of the Registrar, who is also the Commissioner of the CIPC,<sup>70</sup> to include general supervision, accreditation,

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<sup>67</sup> Companies Act, ss186 and 187; DTI 'Presentation to the Subcommittee: Trade and Industry – Regulation of Collecting Societies' (28 March 2018) 6 available at [https://www.thedti.gov.za/parliament/2018/SubCommittee\\_Copyright.pdf](https://www.thedti.gov.za/parliament/2018/SubCommittee_Copyright.pdf), accessed 5 April 2018

<sup>68</sup> SA Copyright Act, s29(4) and (5).

<sup>69</sup> Companies Act, ss1, 8, 13, 30, 33, 34, part f of Chapter 2, 81(1)(f), and Schedule 1.

<sup>70</sup> SA Copyright Act, s1: 'Registrar means the Commissioner appointed in terms of section 189 of the [Companies Act]'; CS Regulation, Regulation 1 defines the Registrar to mean 'the Registrar of Copyright at the Companies and Intellectual Property Registration Office (CIPRO).' Note that CIPRO is now defunct and replaced with CIPC under Companies Act, s189. Thus, Regulation 1 should be read to mean the Registrar of Copyright at CIPC.

renewal and withdrawal of accreditation of needletime CMOs; maintenance of the register of accredited needletime CMOs; and ensuring that needletime CMOs carry out their legal obligations. Other responsibilities of the Registrar in this regard are approval of needletime CMOs' distribution plans; and attendance of annual or special general meetings of members of accredited needletime CMOs if invited. The Registrar is also empowered to receive an annual activity report from accredited needletime CMOs setting out information on their activities, financial records, among others as may be necessary to assess the degree of compliance of the needletime CMOs with the CS Regulations, the SA Copyright Act and Performers Protection Act. Further, the Registrar may apply to the court for relief against airing needletime CMOs and for an order placing such CMO under judicial management, winding-up or dissolving the CMO, among others.<sup>71</sup>

The Competition Commission is another agency that may play a role in the regulation of CMOs in South Africa. The Competition Commission is established under the Competition Act.<sup>72</sup> Among others,<sup>73</sup> it is empowered to implement measures to increase market transparency; investigate and evaluate alleged restrictive horizontal and vertical practices,<sup>74</sup> and abuse of dominant positions;<sup>75</sup> control mergers;<sup>76</sup> and grant or refuse applications for exemptions under the Competition Act.<sup>77</sup> However, the supervision of CMOs by the Competition Commission would depend on whether CMOs are excluded from the application of the Competition Act<sup>78</sup> or whether they fall under the category of undertakings that may be exempted under s10 of the Competition Act. Overall, the focus of this thesis is whether there is need to apply the Competition Act to CMOs at all. The answer to this question will depend on whether the SA Copyright Act, Performers Protection Act and CS Regulations empower the CIPC to address the CMOs' competition law concerns. This issue will be resolved in the next

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<sup>71</sup> Regulations 3, 4, 8(5); *Shapiro v SARRAL* supra note 12.

<sup>72</sup> Competition Act, ss19 and 20.

<sup>73</sup> Competition Act, s21.

<sup>74</sup> Competition Act, ss4 and 5.

<sup>75</sup> Competition Act, Chapter 2, Part B.

<sup>76</sup> Competition Act, s3. The section excludes certain undertakings, including concerted conducts designed to achieve a non-commercial socio-economic objective or similar purpose, from the Competition Act's ambit. Given the role of collecting societies, it appears they may be excluded from the Competition Act. However, similar provision under the TFEU (Article 106(2)) has been interpreted otherwise by the CJEU in *OSA v Lecebne Lazne*, unreported Case C-351/12, para.81(27 February 2014).

<sup>77</sup> Competition Act, s10.

<sup>78</sup> Competition Act, s3(1)(e).



chapter. For now, the general perception appears to be that the Competition Act is applicable to CMOs in principle,<sup>79</sup> although the reality is that only the SA Copyright Act, Performers Protection Act and CS Regulations have been applied to CMOs in practice. Thus, the remainder part of this chapter will largely focus on the provisions of the SA Copyright Act, Performers Protection Act and CS Regulations. Provisions of the Companies Act will only be examined as they become relevant.

#### **4.5 Current regulation of CMOs**

The discussion in this part is divided into five sub-sections. The first sub-section focuses on the regulation of needletime CMOs, while the second relates to non-needletime CMOs. In this regard, the first two sub-sections generally address issues regarding accreditation and the permissible number of CMOs; the relationship between CMOs and copyright owners (their members); and the relationship between CMOs and users of copyright works under the current regulatory framework. The relationship between CMOs under the regulation regime is discussed in the third sub-section generally. The fourth and fifth sub-sections then examines provisions relating to the internal management, transparency and accountability of all CMOs, and dispute resolution in collective management generally.

##### **4.5.1 Regulation of needletime CMOs**

This sub-section examines the provisions of the CS Regulations. As now already overflooded, the CS Regulations only applies to needletime CMOs. Thus, the discussions here focus only on needletime CMOs. However, it is important to state at the outset that the SA Copyright Act, Performers Protection Act and CS Regulations, as well as the Companies Act, are silent on the issue of CMOs' legal form. In other words, CMOs (needletime and non-needletime) in South Africa are generally not expressly required

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<sup>79</sup> For instance, an attempt at applying competition law principles to royalty dispute between a collecting society and a user of sound recording was rejected by the SCA as follows: 'It is quite clear, however, that at no stage during the lengthy proceedings before the [Copyright Tribunal] were principles of competition law referred to, or applied. The evidence led by the parties did not have as its objective the proof of any principles of competition law. If from the outset the dispute between the parties had been framed in the context of competition law principles, there is ground for thinking that further, or other, evidence, would have been produced by the parties. The issue was not investigated or canvassed before the [Copyright Tribunal]. To apply these principles now would alter the whole basis upon which the parties approached and dealt with the central dispute between them.' *SAMPRA v Foschini* supra note 42, para 5; J Hofman and T Schonwetter 'International agreements, national fair use legislation and copyright royalty collection agents' (2006) available at <http://pcf4.dec.uwi.edu/viewabstract.php?id=255>, accessed on 18 November 2017.

to adopt any particular legal form. It should be noted that CMOs are generally non-profit organisations and unless required by law they can take any other form such as limited liability companies or partnerships, amongst others. Indeed, as shown in 4.2 above, most of the CMOs in South Africa are non-profit companies, while some are private companies. Therefore, any organisation intending to act as a needletime or non-needletime CMO would be at liberty to choose any legal form. However, such organisation would need to comply with the provisions of the Companies Act relating to formation of companies generally.<sup>80</sup>

#### **4.5.1.1 Accreditation to operate as needletime CMO**

The CS Regulations empower the Registrar to accredit any person or licensing body interested in functioning as a CMO on behalf of fifty or more music producers (or an organisation representing them), or fifty or more performers (or an organisation representing them), either jointly or separately.<sup>81</sup> Such person or licensing body must apply in writing to the Registrar who may consult any person or institution before granting or refusing the application.<sup>82</sup> The requirements for the grant of accreditation are –<sup>83</sup>

- the applicant is capable of ensuring adequate, efficient and effective administration of the rights to be entrusted to it.
- the applicant's membership is open to all rights owners (or their association) of the class of rights the applicant intends to administer.
- the applicant affords its members the right and opportunity to take part in the decision-making process relating to the applicant's affairs, the administration of rights and distribution of royalties.
- the applicant is capable of complying with its obligations under the CS Regulations.
- the managers and members of the governing body are largely South Africans or permanent residents and are fit and proper persons to act in the capacity.
- the applicant's place of business is situated in South Africa.

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<sup>80</sup> Companies Act, ss8, 10, Chapter 2 (parts A and B), and Schedule 1.

<sup>81</sup> Regulation 3(1).

<sup>82</sup> Regulation 3(2).

<sup>83</sup> Regulation 3(3).

- the accreditation will not undermine or diminish the adequate, efficient and effective administration of rights by an already established and accredited needletime CMO.

If the above requirements are satisfied, the Registrar is enjoined to grant the accreditation.<sup>84</sup> But where the requirements are not met, the Registrar has two options. First, he/she may provisionally refuse accreditation, if, in his/her opinion, the applicant may modify and/or supplement the application to meet the requirements. Where this is the case, the Registrar is expected, within 30 days of notifying the applicant of the provisional refusal, to furnish the applicant with reasons for same.<sup>85</sup> The Registrar is also required to give the applicant a further period of not less than 30 days to modify and/or supplement the application, after which the Registrar may grant or refuse the application depending on whether or not the conditions for accreditation are met.<sup>86</sup> Secondly, the Registrar may refuse an application outright from the outset if the applicant does not satisfy the above conditions. In such cases, the Registrar is obligated, within 30 days of the refusal, to furnish the applicant with reasons in writing.<sup>87</sup>

The Registrar has exercised the accreditation powers in the past. The defunct SARRAL was the first CMO to be accredited under the CS Regulations. SARRAL was accredited in March 2007.<sup>88</sup> SARRAL's accreditation was questionable because it came at a time when there was a pending winding-up petition against SARRAL.<sup>89</sup> According to Baloyi and Pistorius, SARRAL 'used the accreditation to persuade the court not to liquidate it'.<sup>90</sup> In fact, SARRAL's counsel had contended in court that 'accreditation could not have been granted unless the Registrar was satisfied that [SARRAL] was able to ensure adequate, efficient and effective administration of the rights entrusted to it'.<sup>91</sup> This argument did not impress the court, which held through Burochowitz J:

'There is no dispute that the main or principal business of [SARRAL] pertains to the collection of mechanical royalties in respect of mechanical reproductions of composers' works and not needletime royalties. *The Registrar has no powers or rights*

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<sup>84</sup> Regulation 3(4)(a).

<sup>85</sup> Regulation 3(4)(b).

<sup>86</sup> Regulation 3(4)(d).

<sup>87</sup> Regulation 3(4)(c).

<sup>88</sup> Baloyi and Pistorius op cit note 1 at 396.

<sup>89</sup> *Shapiro v SARRAL* supra note 12.

<sup>90</sup> Baloyi and Pistorius op cit note 1.

<sup>91</sup> *Shapiro v SARRAL* supra note 12 at 12.

*to regulate or to seek to regulate [SARRAL]'s non-needletime royalty collections.'*<sup>92</sup>  
(emphasis mine)

The part of the above pronouncement highlighted in italics needs to be carefully scrutinised. It may mean that the Registrar cannot regulate non-needletime CMOs. However, as canvassed in 4.4 above, the Registrar, who is also the Commissioner of CIPC, has general powers to supervise all CMOs in South Africa. The Registrar's supervisory powers relating to needletime CMOs is governed by the provisions of the SA Copyright Act, Performers Protection Act and CS Regulations, as well as relevant provisions of the Companies Act. The non-needletime CMOs are subject to the powers of the Registrar under the Companies Act, SA Copyright Act and Performers Protection Act, excluding the CS Regulations. Granted, non-needletime CMOs do not require accreditation. It is submitted, however, that the Registrar can regulate their royalty collections, among others, for instance by issuing a notice requiring a the non-needletime CMO to comply with the terms of its constitutive documents. The Registrar may then apply for winding up if the grounds contemplated in the Companies Act occur.<sup>93</sup>

Overall, the court found instances of mismanagement, lack of transparency, accountability and probity in the dealings of SARRAL regarding the administration of its members' mechanical rights.<sup>94</sup> Consequently, SARRAL was wound-up and its application for leave to appeal against the winding-up order was refused.<sup>95</sup> The Registrar eventually withdrew SARRAL's accreditation in 2010.<sup>96</sup> The court's decision seemed to further strengthen the CRC's statement that

'in accrediting [needletime CMOs], the level of compliance was less than satisfactory. The most concerning case is in respect of SARRAL, which was accredited despite the fact that it had received a qualified audit report for the three consecutive years, had failed to comply with the [Companies Act] with regard the issuance of the audited financial statements, and had a pending case about its financial status. The lesson arising from this saga is that a comprehensive investigation is required before any accreditation process can be concluded.'<sup>97</sup>

SAMPRA was the second CMO to be accredited under the CS Regulations. It was accredited in June 2007.<sup>98</sup> However, it appears SAMPRA applied for renewal in

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<sup>92</sup> Ibid at 15.

<sup>93</sup> Companies Act, s81(1)(f).

<sup>94</sup> *Shapiro v SARRAL* supra note 12 at 33-45.

<sup>95</sup> Gilfillan op cit note 10 at 17.

<sup>96</sup> DTI op cit note 7 at 43.

<sup>97</sup> Ibid at 44.

<sup>98</sup> Baloyi and Pistorius op cit note 1 at 396.

2012 which was provisionally refused in July of the same year.<sup>99</sup> This may not be unconnected to the then raging controversy on the distribution of royalty between music producers (represented by SAMPRA) and performers (represented by SAMRO).<sup>100</sup>

The main issue concerned the exact share of the royalties for music producers and performers and who was to collect the performers share. SAMRO's stand was that the share should be equal (50/50) between the performers and the music producers. Also, that it is entitled to collect the performers' share from SAMPRA and distribute accordingly. On the other hand, SAMPRA held the position that it was obligated to pay the needletime royalties to music producers who would determine the performers share and pay them the royalty less any advances paid to them in terms of their recording agreement.<sup>101</sup> The Registrar shared SAMRO's view and indeed refused to approve the distribution plan submitted by SAMPRA. According to Baloyi and Pistorius, the issue led the Registrar into 'threatening to terminate SAMPRA's accreditation as a CMO, prompting SAMPRA to institute legal proceedings against the Registrar and SAMRO to have the Registrar's decision reversed'.<sup>102</sup> SAMPRA was eventually accredited in October 2012 and again in 2014.<sup>103</sup>

The next CMO to be accredited was SAMRO in 2008.<sup>104</sup> SAMRO was accredited in respect of its performer members that comprised the Performers Organisation of South Africa (POSA) Trust, an arm of the new SAMPRA. Following this, IMPRA was accredited in August 2015.<sup>105</sup> In view of Regulation 3(3)(g) of the CS Regulations and the accreditation of SAMPRA (note the discussion on the new SAMPRA above), it is doubtful whether the Registrar acted in compliance with the CS regulations in accrediting IMPRA. Regulation 3(3)(g) will be examined shortly.

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<sup>99</sup> GN No. 577, GG No. 35530 of 19 July 2012.

<sup>100</sup> N Matzukis 'The Great South African Needletime Debacle' (2012) available at <http://www.posatrust.org.za/downloads/2012-05-26/Nick-Matzukis-Presentation.pdf>, accessed on 21 September 2017.

<sup>101</sup> Ibid.

<sup>102</sup> *SAMPRA v Kadi Petje & Ors.* unreported case no 9085/2010. The case was eventually withdrawn prompting SAMRO to institute *SAMRO v SAMPRA & Ors.* unreported case no 42008/13 for an interim interdict preventing SAMPRA from distributing its royalties. This case was also withdrawn following agreement between SAMPRA and SAMRO to end the conflict: Baloyi and Pistorius op cit note 1 at 381, fn 66.

<sup>103</sup> GN No. R. 848, GG No. 35791 of 19 October 2012; GN Nos. 1068 and 1069, GG No. 38232 of 28 November 2014.

<sup>104</sup> Baloyi and Pistorius op cit note 1 at 396.

<sup>105</sup> GN No. 680, GG No. 39066 of 7 August 2015.

Accreditations granted under the CS Regulations have a five-year lifespan, renewable every five years for another five years. CMOs have to apply for such renewal six months prior to the expiry of the initial accreditation. The renewal is not automatic: the Registrar still has to satisfy himself/herself that the requirements stated above have been fulfilled.<sup>106</sup> When/if the CAB is enacted, the five-year lifespan will apply to all CMOs in terms of the proposed s 22B(5) of the CAB. Relevant proposals in the CAB will be discussed in 4.6 below.

The CS Regulations empowers the Registrar to withdraw an accreditation earlier granted. However, the Registrar must notify the CMO and state the reasons for such withdrawal. The situations that can lead to withdrawal of accreditation are –<sup>107</sup>

- failure to disclose material facts at the point of application that may lead refusal of the application;
- the Registrar becoming aware of unknown facts at the time of accreditation or subsequent occurrences, which would have constituted a ground for refusal of the application and which could have been irremediable;
- In the Registrar's opinion, the collecting society fails to comply with its obligations under the CS Regulations and ignores directions by the Registrar regarding the infractions;
- A liquidation order has been issued against the CMO.<sup>108</sup>

To prevent arbitrariness, the Registrar's powers to grant, renew and withdraw accreditation under the CS Regulations are subject to judicial review at the Gauteng Division of the High Court of South Africa.<sup>109</sup>

The CS Regulations does not stipulate the effect of the Registrar's refusal to accredit a needletime CMO. It also does not proscribe such CMO. As will be shown in 4.6 below, the proposed s22B of the CAB – which is largely similar to regulation 3 and which would apply to all CMOs if passed into law – does not take care of the situation either.<sup>110</sup> The sanctions prescribed in regulation 4(4) (to be discussed shortly) applies

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<sup>106</sup> Regulation 3(5).

<sup>107</sup> Regulation 3(6).

<sup>108</sup> SARRAL's accreditation was withdrawn in 2010 owing to the liquidation order issued against it in *Shapiro v SARRAL* supra note 12.

<sup>109</sup> Regulation 4(8); *Foschini v SAMPRO* (Copyright Tribunal) supra note 41, para 3.

<sup>110</sup> This point has already been highlighted and recommendations made in UCT's IP-Unit 'South African Copyright Amendment Bill, 2017: Comments' (2017) 26 available at [http://ip-unit.org/wpcontent/uploads/2017/07/CopyrightBill2017\\_UCTsubmission072017.pdf](http://ip-unit.org/wpcontent/uploads/2017/07/CopyrightBill2017_UCTsubmission072017.pdf), accessed on 21 September 2017.

only to accredited needletime CMOs. It seems that an unaccredited needletime CMO may continue to exist legally outside the supervision of the Registrar like other non-needletime CMOs. Upon incorporation, CMOs become juristic persons – with other attributes conferred by incorporation – which exist in perpetuity until their name is removed from the companies register under the Companies Act.<sup>111</sup> Refusal of accreditation to operate as a CMO is not a ground upon which the CIPC may apply to court for winding-up of a company. Since the Registrar cannot supervise such unaccredited needletime CMO in terms of the CS Regulations, it is arguable that he would only apply for winding-up of the CMO if the situations highlighted in the Companies Act occur.<sup>112</sup>

#### 4.5.1.2 *Number of needletime CMOs*

Although not expressly stated, there seems to be some indication in the CS Regulations as to the number of needletime CMOs that may be accredited for needletime rights. Regulation 3(3)(g) seems more apposite on the number of CMOs. It provides:

‘The Registrar shall not grant accreditation to an applicant unless he or she is satisfied that – [...] the accreditation of the applicant does not conflict with, undermine or diminish the adequate, efficient, and effective administration of the right to receive payment of a royalty in terms of section 9A [SA Copyright Act] or section 5(1)(b) Performers Protection Act, as undertaken by a [CMO] already accredited and established under the [SA Copyright Act]’.

Some points are deducible from the foregoing. The number of needletime CMOs to be accredited at any point in time is based on the discretion of the Registrar. Thus, if the Registrar already accredited one needletime CMO for performers, he/she may not accredit another unless he is satisfied that accrediting the other CMO will not undermine the smooth administration of performers’ needletime rights by the first accredited CMO. Similarly, if the Registrar already accredited one needletime CMO for music producers, he/she may not accredit another unless he/she is satisfied that accrediting the other CMO will not undermine the smooth administration of music producers’ needletime right by the first accredited CMO. Finally, if the Registrar already accredited one needletime CMO for music producers and performers jointly, he/she may not accredit another unless he/she is satisfied that accrediting the other

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<sup>111</sup> Companies Act, s19.

<sup>112</sup> Companies Act, s81(1)(f).

CMO will not undermine the smooth administration of the music producers and performers right by the first accredited CMO.

As earlier noted, there are currently two needletime CMOs: the new SAMPRA and IMPRA. IMPRA was accredited later in time. The basis for accrediting the two CMOs is not clear. However, it seems accrediting one CMO for music producers and performers jointly would bring about a more efficient and effective administration of needletime rights. The squabble in the past between SAMRO and SAMPRA (alluded to in 4.5.1.1 above and 4.5.1.3(b) below) and its impact on royalty distribution should have weighed heavily in the mind of the Registrar when considering the application of IMPRA. The effect of having two CMOs for one right on the users (as discussed in the previous chapter) of sound recordings is another factor the Registrar should have considered. Further, the Registrar should have been persuaded by the recommendation of the CRC in respect of ‘one society one right’, especially since IMPRA’s application was considered at a time when SAMRO and SAMPRA were negotiating a single platform for administration of their needletime rights. The CRC’s recommendation influenced relevant proposals in the CAB examined 4.6 below.

#### **4.5.1.3** *Relationship between needletime CMOs and copyright owners*

The discussion that follows focuses on how the relationship between needletime CMOs and their members are regulated.

##### **a.** Membership of needletime CMOs

Primarily, the relationship between needletime CMOs and their members is defined by their constitutive documents (memorandum of incorporation – MOI – and other company rules), which must comply with the CS Regulations and relevant provisions of the Companies Act. The two needletime CMOs (SAMPRA and IMPRA) are non-profit companies. A non-profit company is a company incorporated for a public benefit or for an object relating to one or more cultural or social activities, or communal or group interest; and whose income and property are not distributable to its incorporators, members, directors or persons related to any of them, except ‘as a payment in respect of any rights of that person, to the extent that such right are administered by the company in order to advance a stated object of the company’, among others.<sup>113</sup> As such,

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<sup>113</sup> Companies Act, s1, Schedule 1 para 1(3)(c).



they are generally not required to have members, except where their MOI provides otherwise.<sup>114</sup> However, where their MOI requires them to have members, membership shall not be restricted or regulated in such a way that amounts to unfair discrimination on grounds of sex, ethnic or social origin, colour, sexual orientation, religion, among others.<sup>115</sup> Indeed, all members must be treated equally in terms of rights administration. Also, the MOI may allow membership to be held by juristic persons, including profit companies.<sup>116</sup> Such juristic persons or profit companies should be those representing the class of right holders falling within the repertoire of the needletime CMOs.

The CS Regulations specifically requires membership of needletime CMOs to be open to persons falling within the class of right holders represented by the CMOs, either directly or through an organisation of the class of right holders.<sup>117</sup> An additional equality standard is provided for needletime CMOs composed of music producers and performers. The CS Regulations require the governing structure of such CMOs to provide for equal representation of the music producers and performers in the decision-making process of the highest executive organ and the general assembly of the CMOs.<sup>118</sup> Further, the CS Regulations preserves the rights, remedies and reliefs that members of needletime CMOs are entitled to under their membership agreement, the common law or any statute governing the CMOs.<sup>119</sup>

The CS Regulations is silent on whether needletime CMOs may classify their members into voting and non-voting. It simply confers voting rights on each member of needletime CMOs with the effect that all members of needletime CMOs must be voting members.<sup>120</sup> However, it is submitted that the CS Regulations must be read subject to the provisions of the Companies Act, which is the specific legislation that defines the form, and the content of MOIs, of legal entities. Under the Companies Act, a needletime CMO's MOI may provide for two classes of members – voting and non-voting members – and must stipulate the qualification for membership; the process of applying for membership; any initial or periodic cost of membership in any class; the grounds on which membership may cease or be suspended; and the rights and

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<sup>114</sup> Companies Act, Schedule 1 para 4(1)

<sup>115</sup> Companies Act, Schedule 1 para 4(2)(a); Constitution of the Republic of South Africa, s9.

<sup>116</sup> Companies Act, Schedule 1 para 4(2)(c).

<sup>117</sup> Regulation 5(1).

<sup>118</sup> Regulation 5(2).

<sup>119</sup> Regulation 5(5); *Shapiro v SARRAL* supra note 12 at 14-15.

<sup>120</sup> Regulation 5(3).

obligations of membership in any class.<sup>121</sup> Each voting members of needletime CMOs are entitled to one vote, and except otherwise provided by the MOI, the vote of every member is equal in value on any matter to be determined by vote in the CMO.<sup>122</sup> Therefore, the voting rights referred to in the CS Regulations would be exercisable by a voting member where the needletime CMO has two classes of members in terms of the Companies Act. Where the needletime CMO does not classify its membership into voting and non-voting, then the voting rights would be exercisable by all members. In addition, the members of needletime CMOs are entitled to obtain the CMOs' annual statement of account, auditors' reports, list of members of the governing council, among others.<sup>123</sup>

Further, under the Companies Act, needletime CMOs, as non-profit companies, are prohibited from presuming the membership of any person; regarding any person as their member; or providing automatic membership of any person on any basis other than life-time membership awarded to a person for service to the collecting society and with the consent of the person.<sup>124</sup> Finally, such CMOs are required to maintain a membership register.<sup>125</sup>

#### **b. Royalty distribution of needletime CMOs**

As gleaned from discussions in chapter two, one of the main roles of CMOs is the distribution of royalties among its members. Indeed, South African CMOs' effectiveness and efficiency have been gauged on the basis of the frequency and size of their royalty distribution among others.<sup>126</sup> The discussion in this sub-section is important in view of a recent report which alleged some impropriety on the royalty distribution practice of a CMO, such as 'unlawful deductions from mostly black songwriters to benefit mostly corporate record company interests' and non-remittal of royalties to members.<sup>127</sup> However, the aim here is basically to examine the provisions of the CS Regulations on royalty distribution by needletime CMOs. That of non-

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<sup>121</sup> Companies Act, Schedule 1 para 4(d) and (e).

<sup>122</sup> Companies Act, Schedule 1 para 1(7) and (8).

<sup>123</sup> Regulation 5(4).

<sup>124</sup> Companies Act, Schedule 1 para 4(2).

<sup>125</sup> Companies Act, Schedule 1 para 1(9).

<sup>126</sup> DTI op cit note 7 at 69-77.

<sup>127</sup> C Blignaut 'Gospel Shocker: how black musicians got screwed' 1 April 2018 City Press 2. See also, S Molobo 'Drama at Artists' Meeting' *Daily Sun* 26 April 2018.

needletime CMOs will be examined in 4.5.2 below. Discussion of the level of compliance by CMOs is beyond the scope of this thesis.

The CS Regulations specifically governs the royalty distribution of needletime CMOs. That is not to say needletime CMOs are not subject to relevant provisions in the SA Copyright Act, Performers Protection Act and the Companies Act that relate to royalty distribution.

Generally, the Companies Act requires all needletime CMOs as non-profit companies to apply all their assets and income to advancing their objectives. They are prohibited from directly or indirectly paying any portion of their income to their members except as payment of royalty in respect of the rights of that person administered by the CMO, among others.<sup>128</sup> Arguably, this provision may be regarded as the foundation for the distribution rules of needletime CMOs, a discussion of which is beyond the present scope.<sup>129</sup> It suffices to state that needletime CMOs are expected to distribute royalties among their members fairly and based on the actual usage of works,<sup>130</sup> determined by usage data supplied by users or by sampling as the case may be. Even so, they are not expected to distribute all royalties collected to their members. As already noted in the previous chapters, CMOs are generally entitled to retain a certain percentage of royalties collected to cover their administrative costs. The drafters of the CAB recognised this point when they proposed a new s22C(2)(c), which will be examined in section 4.6 below.

Specifically, needletime CMOs' royalty distribution is guided by s9A SA Copyright Act and s5 Performers Protection Act.<sup>131</sup> By a combined reading of s9A(2) SA Copyright Act and s5(4) Performers Protection Act, a music producer who has been authorised by a performer to embody his performance in a sound recording is entitled to collect needletime royalties for such performance. However, the royalty collected must be shared between the music producer and the performer. The performer's share is to be determined by an agreement between the music producer and the performer or between their respective CMOs. Failing such agreement, the music producer or performer may refer the matter to the Copyright Tribunal under the SA Copyright Act

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<sup>128</sup> Companies Act, Schedule 1 para 3.

<sup>129</sup> For instance, see SAMPRO's MOI op cit note 30, art.25.

<sup>130</sup> Regulation 8(3).

<sup>131</sup> Regulation 6(1).

or they may agree to submit to arbitration in terms of the Arbitration Act, No. 42 of 1965.

The foregoing provision was at the heart of the needletime royalty crises highlighted in 4.5.1.1 above. The crises would have been averted had the SA Copyright Act and Performers Protection Act provided the percentage share for performers. It appears the CS Regulations attempted to fill this lacuna. As one of the grounds for approval of a needletime CMO's distribution plan, the distribution plan should state an equal share of collected royalties between music producers and performers. However, this provision applies only where a CMO represents both music producers and performers and in the absence of a sharing agreement to the contrary.<sup>132</sup> Other grounds for approval of needletime CMOs' distribution plan are:<sup>133</sup> absence of arbitrary or discretionary distribution; and provision, subject to the CMOs' highest executive organ, for not more than 10% of royalty for promotion of arts and culture and members welfare. The s9A being proposed in the CAB does not also fill this gap. The proposed section retained the provisions of the extant s9A in this regard, with a new clause to the effect that the 'performer's share of the royalty shall represent fair and equitable remuneration'.

Further, needletime CMOs are obligated to distribute not less than 80% of collected royalty equitably among their members.<sup>134</sup> The distribution must be done at least once a year with the first distribution done not later than 18 months from the initial accreditation. Thereafter, it should be done on the anniversary of the initial accreditation or renewal of accreditation.<sup>135</sup> Importantly, the distribution must be done based on a distribution plan approved by the Registrar,<sup>136</sup> which shall be applied 'based on information publicly available, trade information available to [the CMOs'] members and on information to be furnished by individual user groups'.<sup>137</sup> Needletime CMOs are allowed to retain not more than 20% of collected royalty to defray administrative costs. To this end, needletime CMOs are enjoined to administer rights effectively and efficiently; to maximise the economic exploitation of the rights; and not to generate or accumulate unneeded profits in their hands.<sup>138</sup>

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<sup>132</sup> Regulation 8(5)(c).

<sup>133</sup> Regulation 8(5)(a) and (b).

<sup>134</sup> Regulation 6(2).

<sup>135</sup> Regulation 8(1).

<sup>136</sup> Regulation 8(5).

<sup>137</sup> Regulation 8(4).

<sup>138</sup> Regulation 6(2); *Foschini v SAMPRO* (Copyright Tribunal) supra note 41, para 6.

The CS Regulations extended its reach to reciprocal agreements. It provides that ‘whenever desirable, or expedient, a [needletime CMO] shall enter into reciprocal agreements with foreign [CMO], and it shall administer the rights entrusted to it and shall distribute at least 80% of the money collected to its members’.<sup>139</sup> This rule recognises the need for needletime CMOs to enter into reciprocal agreements for the benefit of local music producers and performers. However, the legal justification for seeking to regulate a reciprocal agreement is not clear. It seems to stem from the principle of reciprocity and national treatment encapsulated in s4 Performers Protection Act.<sup>140</sup> But as rightly stated in the CRC Report, there are no ‘reciprocal agreements in the copyright regime between states; a state such as South Africa cannot direct how reciprocal agreements should be structured in terms of [s4]’.<sup>141</sup>

Finally, it should be pointed out that the SA Copyright Act, Performers Protection Act and CS Regulations do not stipulate how CMOs may handle the royalties collected on works belonging to non-members. As previously stated in chapter three, this is not the position in Nigeria. An example of how CMOs handle such royalty is found in the CRC report, as follows:

‘SAMRO retains the unclaimed royalties, which include those in respect of undocumented works, for three years. Over the three-year period, attempts are made to trace the beneficiaries of the unclaimed monies. In the case of non-members, those who are successfully traced are asked to join SAMRO and paid their share of distributions. After three years, the unclaimed monies are written back to income and distributed to the members based on the normal distribution criteria.’<sup>142</sup>

CMOs cannot make membership a criterion for payment of royalties to non-members who were successfully traced. They are within their rights to deduct the prescribed administration cost from such royalties before remitting it to the non-members. The money collected as royalty belongs to the copyright owners (members or not) and not the CMOs.<sup>143</sup> Apart from this, SAMRO’s treatment of royalties unclaimed after the three-year period seems justified. However, as recommended by the CRC, there is need for legislative intervention in this regard. Such regulation should prescribe the minimum retention period for unclaimed royalties after which it ‘should only be used for social-related activities and cultural projects that will benefit local

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<sup>139</sup> Regulation 6(3).

<sup>140</sup> See GN No. 136, GG No.11717 of 3 March 1989 in respect of sound recordings.

<sup>141</sup> DTI op cit note 7 at 74. However, see clause 22C(3) of the CAB, which seeks to regulate reciprocal agreements.

<sup>142</sup> DTI op cit note 7 at 77.

<sup>143</sup> *Shapiro v SARRAL* supra note 12 at 32.

artists'.<sup>144</sup> Sadly, the CAB does not propose any specific provision in this regard. However, there are some general provisions being proposed in the CAB, discussed in 4.6 below, that may be of relevance to this issue.

#### 4.5.1.4 *Relationship between needletime CMOs and users*

The discussions here focus on how the licensing practice and tariff setting of needletime CMOs are regulated. These issues are not covered by the Companies Act. They are dealt with by the SA Copyright Act, Performers Protection Act and largely by the CS Regulations.

The SA Copyright Act and Performers Protection Act lay the foundation for the licensing practice of needletime CMOs. Under these laws, users of sound recordings have an option to negotiate needletime royalties with the CMOs representing music producers and performers either jointly or separately; or with the music producers and/or performers directly. Whatever may be the case, payment of needletime royalty to the music producers' CMO discharges users of the obligation of paying to performers' CMO. In the same vein, payment of needletime royalty to performers' CMO discharges users of the obligation of paying music producers' CMO.<sup>145</sup> In essence, the amount payable as royalty must be determined by agreement between the parties.<sup>146</sup> Failing such agreements, the user or CMO involved may refer the matter to the Copyright Tribunal or both parties may agree to submit the matter to arbitration.<sup>147</sup>

For the purpose of such negotiations, needletime CMOs are obligated to make their complete repertoire available on non-discriminatory terms to prospective users.<sup>148</sup> This may not be interpreted to mean that needletime CMOs cannot negotiate different licensing terms with different user groups. Rather, it means that they cannot discriminate among users of the same group.<sup>149</sup> This is because, needletime CMOs may enter into different framework agreements with different user groups for the use of works in their repertoire by potential users. They may also enter into non-exclusive licensing agreements with individual users or user groups.<sup>150</sup> A framework agreement

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<sup>144</sup> DTI op cit note 7 at 80.

<sup>145</sup> SA Copyright Act, s9A(1) and (2)(d); Performers Protection Act, s5(3) and (5).

<sup>146</sup> *Foschini v SAMPRO* (Copyright Tribunal) supra note 41, para 62-63.

<sup>147</sup> Ibid.

<sup>148</sup> Regulation 7(1).

<sup>149</sup> This argument flows from the provisions of Regulation 7(2).

<sup>150</sup> Regulation 7(2), *ibid.*

is defined as a licensing agreement between a CMO and a user group fixing the terms and conditions of use of the repertoire of the CMO. Also, it can be regarded as an agreement between the CMO and a user group setting common standards and providing a uniform basis for the conclusion of individual agreements between the CMO and individual members of the user group.<sup>151</sup>

To prevent arbitrariness, the CS Regulations further enjoins needletime CMOs to negotiate tariffs, among other terms, as part of framework agreements with user groups, or non-exclusive license with individual users as the case may be. Tariffs serve as the basis for determining the amount and manner of payment of royalty for particular use of a work.<sup>152</sup> Tariffs negotiated between needletime CMOs and any user group is expected to be jointly submitted to the Registrar for publication in the gazette and the South African Intellectual Property Journal (SAIPJ).<sup>153</sup> Needletime CMOs are obligated to grant a license to individual users, within a user group, who assume responsibility to pay royalties in terms of the published tariff.<sup>154</sup> However, appropriate application may be made to the Copyright Tribunal, by the user group or individual user who disputes the applicability of a tariff proposed by a needletime CMO. Another option is for the matter to be referred to arbitration by both parties.<sup>155</sup> Pending determination of such application or referral, the user group or individual user has the option of paying the royalty amount proposed by the needletime CMO into an escrow account and furnish the CMO with the usage information for later distribution of the funds in the escrow to rights owners. Such a user will then be entitled to use the work in issue pending determination of the application.<sup>156</sup> This option is enforceable by the needletime CMOs through an application to the Copyright Tribunal for a ruling in that regard.<sup>157</sup>

The CRC expressed its dissatisfaction with the provisions of the CS Regulations relating to escrow accounts because moneys paid into the escrow accounts by users cannot be distributed until after resolution of the tariff in dispute and that users may be obliged to pay unreasonably large sums into the account even when the matter is

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<sup>151</sup> Regulation 1.

<sup>152</sup> Regulation 7(3).

<sup>153</sup> Regulation 7(4)

<sup>154</sup> Ibid.

<sup>155</sup> Regulation 7(5).

<sup>156</sup> Ibid.

<sup>157</sup> Regulation 7(6).

subjudiced.<sup>158</sup> But, this writer believes that the provisions are based on pragmatic considerations. It is in tune with the realities of the manner in which sound recordings are broadcasted. According to Karjiker and Jooste, the ‘reality is that broadcasters would, almost invariably, broadcast sound recordings of copyright owners whose works are managed by a CMO’.<sup>159</sup> Thus, the provision on the use of escrow accounts is a win-win situation for both the CMOs and the user. The user is allowed to use the work pending resolution of the dispute, while the CMOs are assured of getting their royalties at the end. In any case, the royalties proposed by the CMO, which is paid into the escrow account by the user, may be reduced by the Copyright Tribunal or the arbitrator at the end. One observable flaw in the CS Regulations, however, is its silence on treatment of the interest accruing to the money in the escrow account.

The SCA recently considered tariff setting by needletime CMOs in two cases. The first case – *NAB v SAMPRA*,<sup>160</sup> was an appeal (by NAB) and cross appeal (by SAMPRA) from the Copyright Tribunal. Apart from determining a reasonable royalty rate, the SCA had to consider issues relating to the Copyright Tribunal’s jurisdiction, the procedure to be adopted by the Copyright Tribunal in such cases and whether the Copyright Tribunal is empowered to determine the date from which royalty became due. In focus now is the issue of reasonable royalty and how it was determined by the SCA.

The fact of the case is that SAMPRA referred a royalty dispute in terms of s9A SA Copyright Act to the Copyright Tribunal on the basis of its proposed formula which was disputed by NAB. In summary, SAMPRA’s formula would lead to a needletime royalty of a maximum of 10% of a radio station’s revenue, with the percentage decreasing depending on the extent of usage of sound recording by the radio station. On its part, NAB proposed a formula which will lead to a needletime royalty of a little over 1% of a broadcaster’s revenue. The Copyright Tribunal, per Sapire AJ, found the expert evidence from both parties unhelpful and instead decided the matter based on value judgment. The Copyright Tribunal based its assessment ‘on the limited information available’,<sup>161</sup> but which will ‘result in an equitable reward to the referrer’s

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<sup>158</sup> DTI op cit note 7 at 3.

<sup>159</sup> S Karjiker and C Jooste ‘Commentary on the Copyright Amendment Bill 2017’ (2017) 14 available at <http://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf>, accessed on 27 September 2017.

<sup>160</sup> Supra note 42.

<sup>161</sup> Ibid para 54-55.



clients, while not imposing an unaffordable burden on the broadcasters.’<sup>162</sup> The Copyright Tribunal then slightly adjusted SAMPRA’s proposed formula and developed a formula that will result in a needletime royalty of a maximum of 7% of a broadcaster’s revenue, with the percentage decreasing depending on the extent of usage of sound recording by the radio station.

The SCA dismissed SAMPRA’s cross appeal, set aside the formula developed by the Copyright Tribunal and substituted it with a formula, which brought needletime royalty to a maximum of 3% of a broadcaster’s revenue. In so doing, the SCA preferred a simple formula to a formula that is ‘complex and susceptible to disputes’ (NAB’s formula).<sup>163</sup> Thus, it rejected audience reach, as well as profitability of a broadcaster as factors to consider when determining royalty rates. The SCA took the view that although broadcasters’ audience is desirable as a factor to be considered, the difficulty of valuing an audience in terms of money should be kept in mind.<sup>164</sup> An attempt by SAMPRA to appeal against the SCA judgement failed as its application for leave to appeal was dismissed by the Constitutional Court (CC).<sup>165</sup>

The SCA held that the Copyright Tribunal’s determination of reasonable royalty was done without reference to crucial evidence and relevant factors. Hence, the discretion conferred on the Copyright Tribunal to determine royalty disputes and fix a royalty that is reasonable in the circumstance is not unfettered. It must be exercised on the bases of relevant factors determined by evidence.<sup>166</sup> The SCA stipulated several factors that should be considered when determining needletime royalty rates for broadcasters.

According to the SCA, the revenue of the broadcaster as contained in the broadcaster’s financial statement and the extensive regulation of the broadcasting industry are important factors to be considered.<sup>167</sup> Further, the editorial content including programme promotions and other contents such as charity drives or competition, but excluding advertisement should be considered.<sup>168</sup> Another factor that should be considered is the royalty rate for music composers. The SCA was of the view

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<sup>162</sup> Ibid.

<sup>163</sup> Ibid para 75.

<sup>164</sup> Ibid para 68.

<sup>165</sup> D Wright ‘Clarifying the pierce of needletime royalties’ (2015) available at <http://thewritecandidate.co.za/clarifying-the-pierce-of-needletime-royalties/>, accessed on 28 September 2017.

<sup>166</sup> *NAB v SAMPRA* supra note 41, para 72-74.

<sup>167</sup> Ibid, para 60-62.

<sup>168</sup> Ibid para 69.

that needletime royalty rate should be lower than that of music composers because they are arguably the key component in music production. The SCA took cognisance of SAMRO's royalty rate, which stood at 3.25% of broadcasters' revenue.<sup>169</sup>

Furthermore, the SCA regarded the financial implication of needletime royalty rates in South Africa as an important factor to be considered. In considering this factor, the Copyright Tribunal is expected to bear in mind the need not to drive broadcasters into using alternative music of session musicians to the detriment of the record industry and that most of the royalty collected by SAMPRA are exported to the US.<sup>170</sup> Moreover, according to the SCA, it is important to consider the royalty rates in countries at similar developmental level as South Africa, without losing sight of local circumstances. The SCA considered the rate of needletime royalties in some countries that qualified as both developed and developing. It found that six developed countries have a rate of more than 5% while two others have a rate of more than 6%. Particularly, the SCA found that 'India, which is probably the more closely comparable country, charges between one and two per cent of total revenue'.<sup>171</sup>

Finally, the SCA did not rule on the issue of when royalty becomes payable. It only noted that the Copyright Tribunal does not have the power to determine such issues. In this regard, the SCA stated that '[...] there are a number of issues that impact on the question of the date from which royalties become due including, but not limited to, prescription and claims for unlawful breach of copyright. Questions concerning the application and enforceability of the provisions of the [SA Copyright Act] also come into play'.<sup>172</sup>

The second case – *SAMPRA v Foschini*,<sup>173</sup> was also an appeal from the Copyright Tribunal.<sup>174</sup> The case before the Copyright Tribunal was based on a referral by Foschini, a South African clothing retail company, owing to its disagreement with the needletime tariff proposed by SAMPRA in respect of broadcast of sound recordings through diffusion service in its retail stores. SAMPRA proposed a royalty on a tariff of R500 per annum for every 50square meter (sqm) of audible area, with audible areas defined as the total area in which the 'publicly performed sound recording' can be heard

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<sup>169</sup> Ibid para 35 and 63.

<sup>170</sup> Ibid para 65-66.

<sup>171</sup> Ibid para 70 and 52.

<sup>172</sup> Ibid para 77.

<sup>173</sup> Supra note 41.

<sup>174</sup> *Foschini v SAMPRA* (Copyright Tribunal) supra note 41; S Karjiker 'Needletime Royalties' 2015 *Without Prejudice* 55-57.

in Foschini's premises.<sup>175</sup> Through its expert witness, Foschini compared SAMPRA's proposed tariff with that of the Phonographic Performance Company of Australia (PPCA) using the purchasing power parity (PPP) between the South African Rands and the Australian Dollar. It then proposed the Rand equivalent of the PPCA's tariff stating that 'it is closer to the efficient market rate' than SAMPRA's tariff.<sup>176</sup> Accordingly, Foschini proposed a tariff R279.46 for every 50sqm. In its ruling, the Copyright Tribunal – per Phatudi J – 'determined that in the circumstances a reasonable tariff lay somewhere between the respective' proposed tariffs.<sup>177</sup> It, therefore, ordered a tariff that was above Foschini's but less than SAMPRA's.<sup>178</sup>

The SCA set aside the Copyright Tribunal's tariff and ordered a tariff set at R150 per annum of every 50sqm of audible area.<sup>179</sup> The issues for determination by the SCA related to the Copyright Tribunal's jurisdiction, the onus of proof on the party referring a royalty dispute to the Copyright Tribunal, the amount of evidence required at the Copyright Tribunal and a reasonable tariff in the circumstance.<sup>180</sup> On the issue of reasonable tariff, which is in focus here, the SCA deduced three possible methods of determining royalty tariffs from the parties' expert evidence.

First is the determination of the Rand value that playing the sound recording adds to Foschini's revenue. The SCA rejected this method since a study of the value of music to retail stores has never been undertaken because of the difficulties that it would pose. Apart from confidentiality implication on Foschini's business, such 'study would be prohibitively expensive and impractical as it would take too long to complete. In addition, it cannot be said that the conclusion reached could be applied to all the retailers'.<sup>181</sup> The other method is the 'market-based solution' which means leaving tariff to be determined by the forces of demand and supply that would eventually push the tariff to an optimum rate. This method was also rejected because the SA Copyright Act and Performers Protection Act preclude market forces from determining tariff rates, but empowers the Copyright Tribunal to determine such issues.<sup>182</sup>

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<sup>175</sup> Supra note 182 para15-16.

<sup>176</sup> Ibid para 52.

<sup>177</sup> Supra note 182 para 5.

<sup>178</sup> Ibid para 76.

<sup>179</sup> Ibid para 56.

<sup>180</sup> Ibid, para 11.

<sup>181</sup> Ibid, para37-38.

<sup>182</sup> Ibid, para38-39.

The last method is the comparison of proposed tariff with those from foreign jurisdictions. The SCA had no difficulty in accepting this method because this method prevents economic arbitrariness in tariff setting and because it had earlier accepted such method in *NAB v SAMPra*.<sup>183</sup> Further, the SCA accepted Foschini's unchallenged expert opinion that in carrying out such comparison, the PPP comparison is more appropriate as it accords more with local income levels, it is fair and would better maximise the welfare of local consumers.<sup>184</sup> The SCA's position in this regard cannot be faulted. And it finds support in a recent decision of the CJEU.<sup>185</sup>

The CJEU's decision was based on a referral from the administrative division of the Supreme Court of Latvia flowing from a decision of its Competition Council (LCC), which imposed a fine on the Consulting Agency on Copyright and Communications/Latvian Authors' Association, Latvia (AKKA/LAA)<sup>186</sup> for abuse of dominant position. AKKA/LAA is the only CMO administering rights in musical, dramatic, literary, artistic and audio-visual works in Latvia.<sup>187</sup> The fine relates to the royalty rate being collected by AKKA/LAA for public performance of music in shops and other service areas among others. The LCC regarded the rate as excessively high. The referral was based on art.102 of TFEU. One of the issues determined by the CJEU was how to determine fairness of price under art.102 TFEU and whether it is appropriate to make comparison with foreign countries for this purpose. Although the case was decided on principles of competition law applicable to CMOs, which will be discussed in the next chapter, the CJEU's decision on the issue is relevant here since it gives some insights on how royalty rates in circumstances similar to the *SAMPRA v Foschini* case may be determined. According to the CJEU,

‘for the purposes of examining whether a [CMO] applies unfair prices [...] it is appropriate to compare its rates with those applicable in neighbouring [countries] as well as with those applicable in other [countries] adjusted in accordance with the PPP index, provided that the reference [countries] have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments’.<sup>188</sup>

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<sup>183</sup> Ibid, para 42.

<sup>184</sup> Ibid, paras 47, 49 and 51.

<sup>185</sup> *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome*, unreported Case C-177/16 (14 September 2017).

<sup>186</sup> Acronym for *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība*.

<sup>187</sup> CISAC ‘AKKA-LAA (LATVIA)’ available at [http://www.cisac.org/Cisac-Home/Our-Members/Members-Directory/\(society\)/20/\(previous\\_url\)/3723](http://www.cisac.org/Cisac-Home/Our-Members/Members-Directory/(society)/20/(previous_url)/3723), accessed on 16 October 2017.

<sup>188</sup> Supra note 181, para 51.

In the CJEU's view, 'objective, appropriate and verifiable criteria' may include 'consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage'.<sup>189</sup> That being said, the SCA, in *SAMPRA v Foschini* also took cognisance of the benefit to users in having to deal with one CMO and not several; and the promotional benefit to music producers of having their music played in retailers' stores. Even so, the SCA seemed to regard these factors as insignificant in determining reasonable needletime tariff.<sup>190</sup>

#### 4.5.2 Regulation of non-needletime CMOs

This sub-heading, examines the regulation of non-needletime collecting societies, which include SAMRO, DALRO, CAPASSO, MPLC, CCLA and RAV. As is apparent from discussions so far, non-needletime CMOs are not within the ambit of the CS Regulations. However, the CIPC can supervise them under relevant provisions of the SA Copyright Act, the Performers Protection Act and the Companies Act. That being said, unlike needletime CMOs, non-needletime CMOs do not require accreditation from the CIPC to operate. Also, the SA Copyright Act and Performers Protection Act do not expressly prescribe the number of non-needletime CMOs that may operate for any given class of right or any particular right. In effect, the number of non-needletime CMOs administering any given class of non-needletime rights is unlimited.

As non-profit and private companies, the relationship between non-needletime CMOs and their members are defined by their MOI and other company rules,<sup>191</sup> in accordance with the Companies Act. SAMRO and CAPASSO are non-profit companies, while DALRO, MPLC and CCLI are private companies. Non-profit companies have already been defined in 4.5.1.3(a) above. Like members of needletime CMOs, the members of non-needletime CMOs that are non-profit companies can also enjoy the rights contained in sch.1, paras.1 and 4 of the Companies Act already examined in 4.5.1.3(a) above. Generally, non-needletime CMOs are required to have a membership register. They are prohibited from regulating their membership unfairly or in a manner that amounts to discrimination on grounds stated in 4.5.1.3(a) above. Also, they may allow membership to be held by juristic persons, including profit companies, which should represent the class of right holders falling within the repertoire of the

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<sup>189</sup> Ibid, para 42.

<sup>190</sup> Supra note 206.

<sup>191</sup> *Shapiro v SARRAL* supra note 12.

non-needletime CMOs. Further, non-needletime CMOs' MOI may provide for voting and non-voting members, and must stipulate the qualification for membership; the grounds on which membership may cease or be suspended; and the rights and obligations of their members, among others. Each voting members of non-needletime CMOs are entitled to one vote, and except otherwise provided by the MOI, the vote of every member is equal in value on any matter to be determined by vote in the CMO. Moreover, non-needletime CMOs are restrained from presuming the membership of any person; regarding any person as their member; or providing automatic membership of any person on any basis other than life-time membership awarded to a person for service to the CMO and with the consent of the person. On the other hand, a private company is a profit company, which is not state-owned and whose MOI restricts the transferability of its securities and prohibits it from offering its securities to the public.<sup>192</sup> Generally, a private company is allowed to have one or a number of shareholder(s). A discussion of shareholders' rights is beyond the scope of this work.<sup>193</sup> It suffices to state now that where a private company has only one shareholder, as in DALRO's case, 'that shareholder may exercise any or all of the voting rights pertaining to that company on any matter without notice or compliance with any other internal formalities' except as otherwise stipulated by the company's MOI.<sup>194</sup> Such CMOs, as private companies, are required to maintain securities registers.<sup>195</sup>

Further, it appears the royalty distribution of non-needletime CMOs will be subject to the relevant provisions of the Companies Act along with the rules stipulated in their constitutive documents, as approved by their members.<sup>196</sup> Indeed, non-needletime CMOs that are non-profit companies have similar duties like needletime CMOs under sch.1 para.3 of the Companies Act as discussed in 4.5.1.3(b) above. They are required to apply all their assets and income to advancing their objectives. Also, they are prohibited from directly or indirectly paying any portion of their income to their members except as payment of royalty in respect of the rights of that person administered by the CMO, among others. Like needletime CMOs, also, these duties

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<sup>192</sup> Companies Act, ss1 and 8(2).

<sup>193</sup> Companies Act, ss57-65.

<sup>194</sup> Companies Act, s57.

<sup>195</sup> Companies Act, s24(4).

<sup>196</sup> *Shapiro v SARRAL* supra note 12.

form the bases for the distribution rules of non-needletime CMOs that are non-profit companies. Examination of the distribution rules is beyond the scope of this thesis.<sup>197</sup>

Regarding the relationship between non-needletime CMOs and users of copyright works, it is submitted that the licensing practice and tariff setting of non-needletime CMOs are not without some form of regulation. Like needletime CMOs, they may also enter into licensing contracts with users.<sup>198</sup> Such contracts are governed by s22 SA Copyright Act and s13 Performers Protection Act. In terms of s13 Performance Protection Act, a performer may contract with any user interested in using his performance. It appears such contract will be valid if executed through a CMO mandated by the performer. Similarly, s22 SA Copyright Act allows the transfer of copyright, either wholly or in part, by way of assignment, exclusive license, non-exclusive license, among others. To be valid, assignments and exclusive licenses must be in writing and signed by the assignor or exclusive licensor, while non-exclusive licenses may be written, oral or implied. Specifically, exploitation of the copyright in a work by a user pursuant to a license issued by a CMO that has been mandated by owners of rights in the work would not be an infringement of copyright.<sup>199</sup> Further, the licensing practice and tariff setting of non-needletime CMOs come under the supervision of the Copyright Tribunal in chapter 3 of the SA Copyright Act, as discussed in 4.5.5 below.

#### **4.5.3 Relationship among CMOs**

The point has been made in 4.5.1.3(b) above that South Africa cannot seek to regulate reciprocal agreements between local and foreign CMOs. However, the relationship among local CMOs may be regulated. Indeed, the need to regulate the relationship among CMOs is stronger in situations where two or more CMOs operate in the same field and market, as is the case with IMPRA and the new SAMPRA. In such circumstances, the aim of regulation will be to prevent collusion by such CMOs geared towards fixing high royalty rates.

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<sup>197</sup> See SAMRO's Performing Rights Distribution Rules available at <http://www.samro.org.za/sites/default/files/SAMRO%20Performing%20Rights%20Royalty%20Distribution%20Rules.pdf>, accessed on 2 October 2017; CAPASSO's Membership Rules, Article 6 available at <http://www.capasso.co.za/index.php/company-documents.html?download=23:capasso-membership-rules-2015>, accessed on 2 October 2017.

<sup>198</sup> S Chahale 'An Overview on the Role of Contracts in Copyright Management' (2018) 26 *KECOBO CopyrightNews* 3.

<sup>199</sup> SA Copyright Act, s22(8).

Apart from the provisions requiring performers' shares of needletime royalties to be determined by agreement between performers and music producers or between their respective CMOs, the relationship among CMOs seems unregulated under the SA Copyright Act and Performers Protection Act. The flaw in the provisions requiring sharing of royalty relating to needletime rights between CMOs representing performers and music producers respectively, and the problem it caused have been identified in section 4.5.1 above. As noted in section 4.5.3.2 above, the CS Regulation 8(5)(b), which proposes an equal share of needletime royalties between performers and music producers only applies when they are represented by a single CMO such as the new SAMPRO. Even so, it appears the Companies Act provides some form of blanket regulation relating to merger. Here, CMOs that are non-profit companies may not amalgamate or merge with a for-profit CMO. They may also not dispose of any part of their assets, undertaking or business to a for-profit CMO, except for fair value and to the extent that such disposition occurred in the ordinary course of the collective management activities.<sup>200</sup>

#### **4.5.4 Internal management, transparency and Accountability**

The demise of SARRAL, as already discussed earlier, is evidence of the need for regulation of CMOs in accordance with good governance principles. The findings of the CRC are further evidence: the CRC found issues relating to significant weakness in internal control, outdated constitutive documents, lack of internal audit, lack of independent directors, lack of issuance of audited financial statements and lack of publication of annual reports, among others being perpetrated by SAMRO, SAMPRO and the defunct SARRAL.<sup>201</sup>

As gleaned from the CRC report, the challenge is not total absence of regulation. It is largely a problem of compliance by CMOs and the effectiveness of the enforcement mechanisms under the regulatory framework. These informed the CRC's recommendation that the CS Regulations be extended to all CMOs and that the CIPC be empowered to take-over the administration of a CMO conducting its affairs in a manner detrimental to the interests of copyright owners.<sup>202</sup>

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<sup>200</sup> Companies Act, Schedule 1 para 2(1).

<sup>201</sup> DTI op cit note 7, 52-53.

<sup>202</sup> Ibid.



The CS Regulations provisions aimed at ensuring good governance only applies to needletime CMOs. Specifically, needletime CMOs are required to always inform the Registrar in writing of their organisational structure, operational features, and changes in their legal representatives within 30 days of such change. In particular, they are obligated to furnish the Registrar with copies of their constitutive documents; any reciprocal agreements with foreign CMOs; changes to such documents and report stating the reason for such changes; and particulars of their auditors. Such CMOs are also bound to furnish the Registrar with their tariffs and any amendments thereto; annual and updated list of members and agreements with foreign CMOs; annual audited financial statements; and any document or report the Registrar may reasonably require.<sup>203</sup>

The Registrar is empowered to grant a grace period of 30 to 90 days to a defaulting needletime CMO to comply with these obligations. However, in case of persistent failure, despite such grace period, the Registrar is empowered to withdraw the needletime CMO's accreditation or apply for an appropriate relief including an order placing the CMO under judicial administration, winding-up or dissolution of the collecting society.<sup>204</sup>

The foregoing does not preclude needletime CMOs from complying with relevant provisions of the Companies Act relating to internal management, transparency and accountability, especially where the CS Regulations is silent. In the same vein, non-needletime CMOs are subject to the principles of good governance under the Companies Act.<sup>205</sup>

Overall, as private companies and non-profit companies, needletime and non-needletime CMOs are bound by the good governance codes contained in the King IV Report.<sup>206</sup> Although the codes are a 'set of voluntary principles and leading practice', a court will usually consider 'all relevant circumstances in determining the appropriate standard of conducts for those charged with governance duties, including what the generally accepted practices for a particular setting and situation are'.<sup>207</sup> Importantly,

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<sup>203</sup> Regulation 4(3).

<sup>204</sup> Regulation 4(4).

<sup>205</sup> Companies Act, ss28, 30, 33, Chapter 2, part f, Schedule 1 para 2 and 5.

<sup>206</sup> Institute of Directors Southern Africa *KING IV Report on Corporate Governance for South Africa 2016* (2016) available at [https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king\\_iv/King\\_IV\\_Report/IoDSA\\_King\\_IV\\_Report\\_-\\_WebVe.pdf](https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf), accessed 9 May 2018 (hereafter King IV Report).

<sup>207</sup> Ibid at 35.

besides taking cognisance of local and international best practices on corporate governance,<sup>208</sup> the King IV Report elaborates on the corporate governance principles enshrined in the Companies Act. Thus, although the King IV Report (like King II and III Reports) is not law, ‘failure to comply with [it] may be an indication that the directors [of a CMO] are not acting in the best interest of the’<sup>209</sup> CMO and in compliance with the Companies Act. Indeed, the corporate governance principle of social responsibility contained in the King II Report (built upon by King IV Report) has been applied by the courts.<sup>210</sup> Moreover, the earlier King II and III Reports, which the King IV Report built upon, informed the CRC’s recommendations on corporate governance for CMOs.<sup>211</sup>

Essentially, the King IV Report aims at promoting ‘ethical and effective leadership’ by governing boards of corporations with the objective to entrench ethical culture, good performance, effective control and legitimacy in corporate governance in South Africa.<sup>212</sup> To this end, the King IV Report identifies four main governance roles and responsibilities of governing boards of corporations such as CMOs. Specifically, the governing boards are to steer and set strategic directions for CMOs regarding their strategy and the ‘way in which specific governance areas are to be approached, addressed and conducted’. Also, CMOs’ governing boards are to approve the policies and planning that give effect to their ‘strategy and the set directions’. Further, CMOs’ governing boards are to ensure accountability through adequate ‘reporting and disclosures’. The governing boards are to monitor and oversee the implementation by management of the CMOs’ policies and plans.<sup>213</sup> The foregoing forms the basis for the specific principles and leading practices of corporate governance highlighted by King IV Report, a detailed discussion of which is beyond the scope of this thesis.<sup>214</sup> For now, it should be noted that, apart from the general corporate governance code, the King IV

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<sup>208</sup> Ibid at 3-7.

<sup>209</sup> S Luiz and Z Taljaard ‘Mass resignation of Board and Social Responsibility of the Company: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*’ (2009) 21 *SAMLJ* 420-425, 425.

<sup>210</sup> For instance, see *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 47.

<sup>211</sup> DTI op cit note 7 at 46-53.

<sup>212</sup> King IV Report op cit note 206 at 20, 35-36.

<sup>213</sup> Ibid at 21.

<sup>214</sup> Ibid at 40-41.

Report contains specific sector supplements for non-profit organisations, among others.<sup>215</sup>

To ensure compliance with these principles, the CRC made some recommendations, including amendment of the SA Copyright Act and Performers Protection Act to bring all ‘music-rights’ CMOs under the Registrar’s supervision; empowerment of the Registrar to take over the management of any CMO being mismanaged; and compulsory adherence of good governance principles by CMOs, among others.<sup>216</sup> The CRC’s recommendation influenced the proposed ss22E and 22F of the CAB examined in section 4.6 below.

#### 4.5.5 Dispute Resolution

The Copyright Tribunal is established under s29 of the SA Copyright Act. The Commissioner of patent under s8 of the Patent Acts, 1978 also sits as the Copyright Tribunal. The Copyright Tribunal is involved in the regulation of CMOs in South Africa. But its role in this regard is limited to dispute resolution in four circumstances. The first two circumstances are applicable to CMOs generally, while the other two apply to needletime CMOs only.

The first situation relates to the reference of a license scheme to the Copyright Tribunal for confirmation or variation as the Copyright Tribunal may determine to be reasonable in the circumstance.<sup>217</sup> A license scheme is a scheme or tariff prepared by a licensing body setting out the classes of cases, the charges, and terms and conditions upon which it is, or the persons on whose behalf it acts are, willing to grant licenses.<sup>218</sup> According to Dean, license schemes are typically operated by CMOs.<sup>219</sup> For the Copyright Tribunal to exercise its role under a reference, the reference may be made by a person or group representing persons falling within the class of users to which the license scheme relates or the CMO operating the license scheme. Upon application, the Copyright Tribunal may join another person or group as a party to the reference if it is satisfied that the person or group has substantial interest in the reference. The Copyright Tribunal may make its variation or confirmation order to be in force indefinitely or for a particular period. But before making an order under the reference,

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<sup>215</sup> Ibid at 117.

<sup>216</sup> DTI op cit note 7 at 53.

<sup>217</sup> SA Copyright Act, ss30(a) and 31(5).

<sup>218</sup> SA Copyright Act, s1.

<sup>219</sup> OH Dean *Handbook of South African Copyright Law* (2015) 1-154, para 12.16.3

the Copyright Tribunal is enjoined to give the parties an opportunity to make their case.<sup>220</sup>

The second circumstance relates to an application to the Copyright Tribunal by a person or group requiring a license under, or in a case not covered by, a license scheme.<sup>221</sup> Two scenarios are possible here. Under the first, a license scheme must be in operation already and the CMO operating the license scheme must have failed or refused to grant or procure the grant of a license to the person or group under the license scheme.<sup>222</sup> The second concerns cases not covered by a license scheme and the collecting society has unreasonably refused or failed to grant, or procure the grant of a license to the person or group requiring it; or the CMO proposes to grant the license subject to unreasonable terms and conditions.<sup>223</sup> In such situations, the Copyright Tribunal is required to give the parties opportunity of presenting their cases. If satisfied that the applicant's case is well-founded, the Copyright Tribunal is obligated to grant compulsory license to the applicant subject to such terms, conditions and payment of charges applicable under the license scheme or as the Copyright Tribunal may determine to be reasonable in cases not covered by a license scheme. Further, upon application, the Copyright Tribunal is empowered to join as a party any person or group it considered to have substantial interest in the dispute before it.<sup>224</sup>

The third circumstance concerns cases where there is no agreement on the amount of needletime royalty between users and CMOs representing music producers and performers jointly or severally. Here, the user or the CMO may refer the matter to the Copyright Tribunal.<sup>225</sup> The last circumstance relates to cases where there is no agreement between the respective CMOs of performers and music producers concerning their percentage share in a needletime royalty. Here, any of the CMOs may refer the matter to the Copyright Tribunal.<sup>226</sup> In such situations, the Copyright Tribunal is empowered to determine 'the dispute in terms of s30, read with ss33(3) and 33(5)' of the SA Copyright Act.<sup>227</sup>

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<sup>220</sup> SA Copyright Act, ss31(1)-(7).

<sup>221</sup> SA Copyright Act, s30(b).

<sup>222</sup> SA Copyright Act, s33(2).

<sup>223</sup> SA Copyright Act, s33(3).

<sup>224</sup> SA Copyright Act, s33(4)-(5).

<sup>225</sup> SA Copyright Act, s9A(1); Performers Protection Act, s5(3).

<sup>226</sup> SA Copyright Act, s9A(2); Performers Protection Act, s5(4).

<sup>227</sup> *SAMPRA v Foschini* supra note 41, para 21.

Chapter 4 of the Copyright Regulations regulates procedural matters relating to the exercise of the Copyright Tribunal's jurisdiction. The regulations relate to forms, commencement of proceedings, preliminary questions, costs, fees, hearing, right of audience, evidence, among others.<sup>228</sup> The procedural rules in the Copyright Regulations were originally enacted to regulate cases falling under the first two circumstances identified above. However, it is settled that the procedural rules apply *mutatis mutandis* to cases falling under the last two situations discussed above.<sup>229</sup> Further, it has been held that the procedure before the Copyright Tribunal is informal. As such, evidence may be given orally, or by affidavit if the parties agree or the Copyright Tribunal so orders. But if given by affidavit, the Copyright Tribunal may require personal attendance of the deponent at any stage for examination or cross-examination.<sup>230</sup> In order to be satisfied that an applicant's case is well-founded 'all that is required of [an applicant] is to place evidence before the [Copyright Tribunal] on the issue [...]. In other words, an evidentiary burden rather than a legal burden of proof. [...] for the [applicant] to succeed the [Copyright Tribunal] is required to be satisfied, on all the evidence placed before it'.<sup>231</sup> Finally, in the exercise of its role under the SA Copyright Act, the Copyright Tribunal has coordinate jurisdiction with the High Court. Thus, at first instance, only the Copyright Tribunal can resolve questions relating to its jurisdiction. Appeals against its decisions are directed to the SCA, not the High Court.<sup>232</sup>

#### 4.6 Proposed regulatory framework for CMOs

As is apparent from the discussion in the preceding sections above, most of the CRC's recommendations, based on identified gaps in the current copyright legal regimes, informed the proposed amendments in the CAB. In relation to CMOs, the CRC recommendations include creating a regulatory framework that brings all CMOs under the control of the CIPC. The regulatory frameworks, according to the CRC, should address specific concerns relating to CMOs' membership, royalty distribution, licensing practices, and corporate governance, among others. The aim in this section is

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<sup>228</sup> Copyright Regulations, Regulations 19-39.

<sup>229</sup> Dean op cit note 219 at 1-155, para 12.16.8; *NAB v SAMPRO* supra note 41; *SAMPRA v Foschini* supra note 41.

<sup>230</sup> *SAMPRA v Foschini* Ibid, paras 24 and 29.

<sup>231</sup> Ibid para 30.

<sup>232</sup> SA Copyright Act, s36; *NAB v SAMPRO* supra note 41 para. 77.

to examine the proposed regulatory framework for CMOs in the CAB to determine if it addresses the existing gaps in the current regulatory mechanism. The proposed regulatory framework is contained in clause 25 in the latest draft of the CAB. Where appropriate, reference will be made to the clause 23, which contained the proposed regulatory framework in the original draft of the CAB.<sup>233</sup> Clause 25 of the latest draft of the CAB contains proposed ss22B to 22F.

In terms of the proposed s22B, all persons intending to function as CMOs in South Africa will be required to obtain accreditation from the CIPC. The CIPC will be empowered to grant accreditation only when it is satisfied that the applicant is able to adequately, effectively and efficiently administer royalty collection; comply with any conditions for accreditation, provisions of the Companies Act, the Broad-based Black Economic Empowerment Act 46 of 2013 and other applicable legislation; and has adopted a constitution that meets the prescribed requirements. Also, the CIPC will be enabled to provide necessary assistance for the formation of CMOs in respect of rights for which no CMO exists. Further, the proposed s22B stipulates a five-year life span for accreditation granted by the CIPC, subject to renewal every five years. The proposed s22B prescribes a transition period for CMOs existing at the time the CAB is enacted and comes into force. Such collecting societies will be obligated to apply for accreditation within 18 months from the coming into force of the Act enacted from the CAB. Pending the outcome of such application and subject to such conditions as the CIPC may indicate in writing, the CMOs will be allowed to continue to operate.

One major gap in the latest draft of the CAB relating to accreditation is the absence of a prescribed number of CMOs for a particular right, contrary to the one-society-one-right recommendation of the CRC. It is important to note that the recommendation was captured in the s22B(6) initially proposed in the original draft of the CAB. According to the proposal, the CIPC ‘shall only register one [CMO] for each right or related right [...]’. The proposal would have transformed South Africa’s collective management to right-based as opposed to the work-based approach. The difference between the two approaches has been discussed in the previous chapter. It appears the administration of non-needletime rights is already adhering to the ‘one society one right’ principle as shown in 4.5.2 above.

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<sup>233</sup> Available at [https://www.thedti.gov.za/parliament/2017/Copyright\\_AB.pdf](https://www.thedti.gov.za/parliament/2017/Copyright_AB.pdf), accessed 27 June 2018.

The National Association of Broadcasters (NAB), a major user group in South Africa, vehemently opposed the proposal on the ground that it will further entrench CMOs' dominance and lead to inefficiencies in royalty payment, especially with regards to CMOs' relationship with NAB members.<sup>234</sup> It appears the drafters of the CAB heeded NAB's opposition because the initially proposed s22B(6) is absent from the latest draft of the CAB, with the effect that if passed into law, the CIPC would not be able to restrict the number of CMOs per right.

NAB's fears seem to be based on the perception that having more than one smaller CMOs over a right would better serve NAB's member's business interest since the CMOs would not be able to 'dictate the terms of royalty tariffs'. First, it is not clear how one-society-one-right will lead to unnecessary bottleneck in the licensing market. On the contrary, it will have a streamlining effect and save users the trouble of obtaining licenses from different CMOs managing the same right. Further, although the proposal will entrench CMOs' monopoly in the licensing market, there is no guarantee that collective management will not be monopolised in the market without such provision. This is because, as argued in 2.4.3 above, the existence of more than one CMO per right does not indicate competition on the licensing market as the repertoire of the CMOs would be complementary from the user perspective. Moreover, there are legal provision in the existing copyright sector-specific legal framework (as shown in the discussion below) preventing CMOs from dictating or unilaterally setting royalty tariffs.

As stated in 4.5.1 above, another gap in the CAB is its silence about the implication of refusal of a CMO to apply for accreditation and, where an application is made, refusal by the CIPC to grant such application. When/if enacted, such silence in the CAB would create a situation where CMOs may continue to operate without accreditation and the CIPC would be incapable of taking necessary actions against the CMO.

What is certain, however, is that the CIPC will be empowered, in terms of the proposed s22E-F, to suspend/and or cancel an accreditation. The proposed s22E will require all CMOs to submit returns and reports as prescribed by the CIPC. Also, it will

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<sup>234</sup> NAB 'The national association of broadcasters' submission to the department of trade and industry on the copyright amendment bill' (2017) 10 available at [http://www.nab.org.za/uploads/files/NAB\\_Submissions\\_-\\_Copyright\\_Amendment\\_Bill\\_2017\\_%28execution\\_version%29.pdf](http://www.nab.org.za/uploads/files/NAB_Submissions_-_Copyright_Amendment_Bill_2017_%28execution_version%29.pdf), accessed 6 April 2018.

empower the CIPC to demand any report or record from CMOs to ensure that the CMOs are administered according to the conditions of their registration and that the royalties are being utilised and distributed in accordance with the SA Copyright Act. In terms of the proposed s22F, the CIPC will be able to issue compliance notices to CMOs or apply to the Copyright Tribunal for an inquiry into their affairs if it is satisfied that they are being mismanaged. Pending such inquiry, the CIPC will be empowered to apply to the Copyright Tribunal for an order suspending the registration of the CMOs. Based on the outcome of the inquiry, the CIPC will be able to apply to the Copyright Tribunal for an order cancelling the registration of the CMO. Where a CMO's registration is suspended or cancelled, the CIPC will be able to take-over the affairs of the CMO. To this end, it may apply to the Copyright Tribunal to appoint any suitable person to assist it.

This being said, the proposed s22C of the CAB speaks to the administration of rights by CMOs for which they will be enabled to accept exclusive authorisation from copyright owners, subject to the copyright owners' right to withdraw such authorisation. The proposed s22C also itemised the major functions of CMOs, which are already discussed in 2.2 above. Further, in terms of the proposed section, CMOs will be able to deduct a prescribed amount to defray administrative cost from royalties collected, but the drafters of the CAB failed to propose the maximum amount to be deducted. From its tenor, it appears the task of prescribing the maximum amount will be left to the CIPC. As stated in chapter three, depending on the level of development of collective management, the ideal situation is to retain not more than 30% of royalties collected. This percentage may either be fixed by law, or by members' mandate. However, the percentage is expected to reduce as the CMOs develop and become more efficient. Indeed, as gleaned from the discussion in 4.5.3.2 above, the CS Regulations already prescribed a maximum amount of 20% for administrative cost from collected royalties by needletime CMOs. Thus, the lacunae in the CAB in this regard may be filled by simply incorporating such provisions in the CAB or increasing the maximum amount to 30%.

The proposed s22D seeks to bring CMOs entirely under control of copyright owners, subject of course to the overall supervision of the CIPC. Specifically, it seeks to subject the collection and distribution of royalty, and the use of collected royalties to the CMOs' constitution; and to obligate CMOs to provide their members regular,



full and detailed information of their activities. Also, the proposed section will require CMOs, as far as may be possible, to distribute collected royalties to copyright owners in proportion to the actual use of their works and as soon as possible but not later than three years from when the royalties were collected. In terms of subsection (3) of the proposed s22D, where a CMO,

‘for whatever reason, is unable to distribute the royalties within three years from the date on which the royalties were collected, that [CMO] shall— (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and (b) upon demand by the performer or copyright owner, or their authorised representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph (a).’

It is not clear why a three-year period for royalty distribution is proposed. The general practice, which was confirmed by the CRC,<sup>235</sup> is that royalties are distributed at the end of each financial year. The fact that CMOs, as corporate entities, are obligated to file annual returns with the CIPC also lays credence to this position. Thus, it is important for the lawmakers to take cognisance of this practice when considering the CAB. Nonetheless, the proposals on how to deal with undistributed royalties are commendable.

One major flaw in the proposed s22D is the failure to make specific proposal on how CMOs are to handle royalties belonging to non-members. However, the proposed section may be interpreted broadly to apply to all royalties collected whether belonging to members or non-members of the CMOs with the implication that the three-year rule and the proposal in subsection (3) applies to royalties belonging to non-members. This is so because the proposed section keeps referring to ‘performers’ and ‘copyright owners’ and not members of CMOs. Another possible interpretation of the proposed section, a narrow one, is that since the opening paragraph of the section refers to ‘performers and copyright owners whose rights [the CMOs] administers’, then the presumption is that the provision is meant to apply only to royalties belonging to members of the CMOs. Such conflicting interpretation can be avoided by an insertion of a specific proposal on how CMOs should deal with royalties belonging to non-members copyright owners.

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<sup>235</sup> DTI op cit note 7 at 71.

Interestingly, the DTI believes that the conflict can be addressed by reference to the proposed s22B(5) CAB which prescribes a five-year accreditation lifespan for CMOs with the effect that CMOs cannot retain royalties of non-member copyright owners beyond five years. The DTI reasoned that it may be ‘practically challenging to legislate on maximum period that [CMOs] may retain royalties before distribution’.<sup>236</sup> This position needs to be properly scrutinised because as the Nigerian regulatory framework shows, there is no practical challenge in this regard. Moreover, the DTI’s position insufficiently considers that at the expiration of the five-year accreditation lifespan the CMOs’ life typically does not end, and that, according to the proposed s22B(5), that the accreditation is not renewable. Further, the DTI’s approach seems to conflate the issue of accreditation lifespan with the dealing of non-member copyright owner’s royalty. Both issues are separate and equally important and the provision for one cannot simply displace the need to provide for another. Indeed, the importance of CMOs’ dealing with royalty of non-member copyright owners may have influenced the specific discussion and recommendation of the CRC in this regard as noted in section 4.5.3.2 above. Leaving this aspect unregulated will simply give CMOs enough room to reap where they did not sow by dealing with copyright in works belonging to non-member copyright owners. It would also be contrary to the counsel of leading authorities on the collective management subject.<sup>237</sup> The regulation in Nigeria, as shown in the previous chapter, can help in crafting the regulation recommended by the CRC.

#### 4.7 Conclusion

Although CMOs are generally under the supervision of the CIPC, only needletime CMOs require accreditation to operate. Even so, the rules are silent on the consequences of non-accreditation. Further, the rules do not prescribe any particular type of legal form for CMOs. Depending on the type of legal form chosen, CMOs are subject to relevant provisions of the Companies Act. Thus, the CIPC’s supervision of CMOs is not limited to the SA Copyright Act, Performers Protection Act and CS Regulation. It extends to relevant provisions of the Companies Act.

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<sup>236</sup> DTI op cit note 67 at 12.

<sup>237</sup> U Uchtenhagen *Copyright Collective Management in Music* (2011) 57, para. 278.

CMOs are required to open their membership to both individuals and juristic persons falling within the class of rights owners forming part of their repertoires. This duty is clear with regards to needletime CMOs. It is not too clear whether such positive duty is imposed on non-needletime CMOs. But all CMOs are prohibited from discriminating against their members in the running of their affairs and in rights management. Further, CMOs are generally required to distribute royalties among their members whose rights they manage. Specifically, needletime CMOs are required to retain not more than 20% of collected royalties. The regulatory framework is silent in the case of non-needletime CMOs. However, depending on the developmental stage of the CMO, a maximum of 30% is considered allowable in practice. Further, unlike non-needletime CMOs, needletime CMOs are expressly required to have a distribution plan that must be approved by the Registrar. Nonetheless, for non-needletime CMOs, the approval of their members suffices. Generally, there is no express provision on the handling of non-member royalties collected by CMOs.

Needletime CMOs are specifically restrained from fixing royalties unilaterally and arbitrarily under s9A SA Copyright Act and s5 Performers Protection Act and the CS Regulation. They are required to conclude framework agreements with users which are to be submitted to the Registrar for publication. Although not expressly restrained from arbitrary and unilateral fixing of royalties, non-needletime CMOs are bound by the general provisions of the SA Copyright Act and Performers Protection Act relating to licensing contracts. In essence, CMOs are required to fix their royalties on the basis of agreements with users of works. Generally, all CMOs are subject to the supervisory role of the Copyright Tribunal under chapter 3 SA Copyright Act. The framework afforded by chapter 3 SA Copyright Act is meant to prevent any form of arbitrariness and unreasonableness on the part of CMOs in the fixing of royalty. Further, needletime CMOs are specifically prohibited from discriminating among the same class of users.

Apart from requiring the performers' and music producers' share of royalty to be determined by agreement between them or their respective CMOs, the SA Copyright Act, Performers Protection Act and CS regulation do not specifically govern the relationship among CMOs. However, CMOs, which are non-profit companies, are restrained from merging with CMOs, which are profit companies, under the Companies Act. The issue of number of CMOs is generally not provided for, except in the case of needletime CMOs. Here, the issue is left to the discretion of the Registrar if he/she is satisfied that accrediting more than one needletime CMOs will not undermine the

smooth administration of the class of right considered. However, it observed that there is a conscious shift, as a matter of practice and proposed legislation, towards ‘one society one right’ as recommended by the CRC.

The forgoing discussion is meant as foundation for resolving the specific questions as to whether the South African regulatory framework contains legal provisions that the CIPC can rely upon to address CMOs’ competition concerns identified in 2.4.3 above. This issue will be interrogated in the next chapter.

## CHAPTER FIVE: REGULATING COLLECTIVE MANAGEMENT ORGANISATIONS THROUGH COMPETITION LAW

### 5.1 Introduction

This chapter discusses CMOs' competition concerns, which include abuse of market dominance, fixing of excessive royalty tariffs, refusal to license, refusal to accept copyright owners as members, discrimination between copyright owners and discrimination between users by CMOs. The chapter also considers if the copyright sector-specific regulatory frameworks in Nigeria and South Africa empower the Nigerian Copyright Commission (NCC) and the Companies and Intellectual Property Commission (CIPC) respectively to address CMOs' competition concerns in the collective management and licensing markets in both countries.

The chapter discusses these issues on the premise the main issue for competition law in relation to CMOs is not whether they should exist as monopolies in the collective management and licensing markets. Indeed, as discussed in 2.4.3 above, competition courts in the US and the EU have accepted the monopolistic nature of CMOs as necessary for fostering efficiency in the collective management and licensing markets. The approach of the courts, as gleaned from established jurisdictions such as the US and EU, has been to preserve CMOs as monopolies while applying competition law to curtail their abusive tendencies as dominant organisations in the collective management and licensing markets.<sup>1</sup> In fact, sector-specific regulations, such as s39 of the Nigerian Copyright Act and s22B(6) contained in the initial draft of the South African Copyright Amendment Bill (but expunged from the latest draft of the bill), which promote such monopoly have been regarded by competition courts to be suitable insofar as the law ensures effective collective management and supervision of the CMOs.<sup>2</sup>

As mentioned in chapter one, Nigeria recently passed by the Federal Competition and Consumer Protection Act, 2018 (Nigerian Competition Act), which

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<sup>1</sup> *BMI v CBS*, 441 U. S. 1 (1979); *BRT v SABAM* (1974) ECR 51.

<sup>2</sup> *OSA v Lecebne Lazne* Case C-351/12 (27 February 2014) para. 70-73.

applies in principle to CMOs. In the case of South Africa, the South African Competition Act (SA Competition Act) has so far not been applied to South African CMOs. Relevant provisions of the Nigerian Competition Act and SA Competition Act are examined in this chapter to extent that they are relevant in achieving the goal of the chapter and overall objective of the thesis. Thus, the chapter does not focus on the very wide field of competition law. It is limited to the aspects that touch on copyright and CMOs.

South African jurisprudence on the copyright and competition law interface is still at infancy,<sup>3</sup> whilst Nigerian jurisprudence is far from beginning.<sup>4</sup> Thus, as stated in chapter one, reliance will be placed on relevant cases from Court of Justice of the European Union (CJEU), the US and India. Where necessary, reliance will also be place on relevant provisions of the EU Collective Rights Management Directives (CRM Directive). Importantly, the findings in the Max Planck Report – *Copyright, Competition and Development* (Max Planck Report) – regarding the law and practice on the application of competition law to CMOs will be echoed and relied upon in this chapter. The Max Planck Report examined important case law from the CJEU and national competition law jurisdictions from around the world, including the US and India. It is the most extensive and authoritative literature in this regard.

This approach finds support in s1(3) of the SA Competition Act, which enables reliance on appropriate foreign and international law when interpreting or applying the Competition Act in South Africa, especially where the provision of the Competition Act being interpreted has similar language as the provisions of arts.101 and 102 of the TFEU,<sup>5</sup> which govern competition within the EU single market. Further, the Nigerian Competition Act does not contain a section similar to s1(3) of the SA Competition Act. Nonetheless, reliance can still be placed on foreign jurisprudence as guide in interpreting relevant provisions of the Nigerian Competition Act. This is so because

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<sup>3</sup> DTI *Intellectual Property Policy of the Republic of South Africa Phase 1* (2018) 30 (IP Policy).

<sup>4</sup> See *EMTS Ltd v MTN Nigeria & Anor.*, Suit No.: FHC/L/CS/130/2016 (decided 25 February 2016). The case was based on a merger and acquisition under the Nigerian Communication Act, 2003 and Nigerian Communication Act-Competition Practice Regulation, 2007. The first respondent had obtained approval from the Nigerian Communications Commission for its acquisition of 100% equity in the 2nd respondent, after which it sought to carry out certain acts while the acquisition's approval was being challenged at the commission. Plaintiff therefore sought, among others, injunctive reliefs against the respondent. The court did not consider the merit of the case as it was struck out for want of jurisdiction.

<sup>5</sup> OECD *Competition Law and Policy in South Africa* (2003) 9-10 available at <https://www.comptrib.co.za/assets/Uploads/Reports/South-Africa-Peer-Review.PDF>, accessed on 15 July 2018.

Nigerian courts usually refer to foreign case law, as persuasive authorities, especially where the foreign case law interpreted a statutory provision similar to the one being applied by the Nigerian court.<sup>6</sup>

## 5.2 Copyright and competition law<sup>7</sup>

The general IP and competition law interface has been examined in a preponderance of literature.<sup>8</sup> The focus here is specifically on the nexus between copyright and competition law. Nonetheless, a detailed discussion is beyond the scope of this chapter. The prevailing view about the intersection follows the complementarity approach, according to which both fields of law are regarded as adopting different methodology but with a similar goal: the enhancement of consumer welfare through the promotion of creativity.<sup>9</sup> This will be explained further in 5.2.1 below. However, the history of modern competition law shows that both fields were regarded at some point as inherently conflicting fields that should be kept separate within the bounds of their respective legal territory.<sup>10</sup>

Although described as a ‘complex interface’ by the South African Competition Tribunal,<sup>11</sup> the complementarity approach is reflected in the SA Competition Act.<sup>12</sup> In this regard and as gleaned from most of the few South African cases examined in 5.2.3 below, the IP-competition law connection in South Africa has been more manifest in the area of patent law specifically with regards to access to health technologies. However, the Competition Act initially excluded, in its s3(1), ‘acts subject to or

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<sup>6</sup> Foreign case law is relied upon by Nigerian courts, when interpreting local statutes, as persuasive authorities. That is, they are relied as guide and not binding authorities. See *Basinco Motors Ltd v Woermann-Line* (2009) LPELR S.C. 24/2003

<sup>7</sup> Discussion under this head builds upon an earlier article by the present writer: D Oriakhogba ‘Balancing the copyright regime in South Africa: thinking outside the copyright box’ available at <https://ip-unit.org/2018/balancing-the-copyright-regime-in-south-africa-thinking-outside-the-copyright-box/>, accessed 9 May 2018.

<sup>8</sup> For instance, see G Gustavo *Intellectual Property and Competition Law: The Innovation Nexus* (2006); J Drexel (ed.) *Research Handbook on Intellectual Property and Competition Law* (2008); H Hovenkamp, et al *IP and Antitrust: An analysis of antitrust principles applied to intellectual property law* (2010); A Pham *Competition law and intellectual property rights: Controlling abuse or abusing control?* (2008); A van der Merwe, et al *Law of Intellectual Property in South Africa* 2nd ed. (2016) 529-544;

<sup>9</sup> J Drexel *Copyright, Competition and Development* (2013) 37.

<sup>10</sup> WS Bowman *Patent and Antitrust Law: A Legal and Economic Appraisal* (1973); WK Tom and JA Newberg ‘Antitrust and intellectual property: from separate spheres to unified fields’ (1997) 66(1) *ALJ* 167-229; A Katz ‘Making sense out of nonsense: intellectual property, antitrust, and market power’ (2007) 49 *ALR* 837-909.

<sup>11</sup> *DW Integrators CC v SAS Institute (Pty) Ltd* [1999–2000] CPLR 191.

<sup>12</sup> See IP Policy op cit note 1 at 29; van der Merwe op cit note 8.

authorised by public regulation’<sup>13</sup> from the operation of its chapter 2 and 3 relating to restrictive agreements, abuse of dominance and merger control. In other words, the inherent conflict approach used to be the position in South Africa. A case based on the challenge of a restrictive term – meant to protect trade secrets – in a licensing contract further confirms this.<sup>14</sup> In that case the plaintiff relied on the SA Competition Act and called on the South African High Court to nullify the restrictive term as being anti-competitive. The High Court rejected this plea and declared that ‘sad would be the day when any statute would completely destroy the need to or the process of balancing the interests and principles at stake in freedom of trade, sanctity of contract, the protection of trade secrets, patent monopoly and the encouragement of constructive competition.’<sup>15</sup>

According to the Competition Tribunal, there were conflicting interpretations of the said s3(1). There was the broad interpretation to the effect that persons subject to sector-specific regulations, such as the SA Copyright Act, Performers Protection Act, CS Regulations and Companies Act, were excluded from the ambit of the Competition Act regardless of whether or not the regulation addressed competition law concerns; and the narrow construction according to which firms were ‘to avoid a situation of double jeopardy so that [they were] not faced with having to defend [themselves] twice under different regulations for the same conduct’.<sup>16</sup> This led to an amendment of the SA Competition Act in 2000, which introduced s3(1A) that removed the previous exclusion.<sup>17</sup> The amendment conferred concurrent jurisdiction on the Competition Tribunal and any sector-specific regulator, such as the CIPC, having jurisdiction over the alleged anti-competitive act.<sup>18</sup>

Even so, a firm<sup>19</sup> may apply to the Competition Commission to exempt ‘any agreement, or practice, or category of agreements or practices’ under the SA Copyright

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<sup>13</sup> Competition Act, s3 before the Competition Second Amendment Act 39 of 2000, s2, which deleted paragraphs (c) and (d) from section 3(1) and introduced section 3(1A).

<sup>14</sup> *Moss gas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321.

<sup>15</sup> *Ibid* at 336.

<sup>16</sup> See *Competition Tribunal Annual Report 2000/2001* (2001) 7 available at <https://www.comptrib.co.za/assets/Uploads/Reports/Annual-Reports/Annual-report-2000-1.pdf>, accessed on 28 April 2018. Specifically, see *Standard Bank Investment Corporation v CompCom SA* (2000) 2 SA 810 (SCA).

<sup>17</sup> *Supra* note 12.

<sup>18</sup> See *CompCom SA v Telkom* [2009] ZASCA 122.

<sup>19</sup> In terms of s1 Competition Act, a firm ‘includes a person, partnership or a trust’.



Act and Performers Protection Act from the operation of chapter 2 of the SA Competition Act.<sup>20</sup> Also, sector-specific regulators, such as the CIPC, are required to negotiate agreements with the Competition Commission in terms of which they will exercise jurisdiction over matters falling under chapters 2 and 3 of the SA Competition Act if such matters are also covered by the relevant sector-specific regulation.<sup>21</sup> The effect of this provision is, among others, to take care of any form of regulatory conflict that may arise as a result of the concurrent jurisdiction of the Competition Commission mentioned above. Thus, where such agreement is made, the jurisdiction of the Competition Commission and the sector-specific regulator would be determined by the agreement.<sup>22</sup> Otherwise, the provisions of the SA Competition Act would prevail.<sup>23</sup> Furthermore, such agreement will have the effect of excluding copyright from the ambit of the SA Competition Act. There is no such agreement, however, currently between the CIPC and the Competition Commission relating to CMOs in South Africa. Nonetheless, it is important to note that, apart from envisioning the challenges that competition law enforcers may face in enforcing competition rules in industries subject to sector-specific regulations, such as the copyright industry (discussed in 2.5 above), the provision can serve as bastion for making the sector-specific regulation defence to competition law oversight. Simply put, the sector-specific defence is an argument relied upon by firms facing competition law scrutiny to the effect that their conduct being investigated is sanctioned by or falls under the oversight of sector specific regulations.<sup>24</sup> Such agreement between a sector-specific regulator and the Competition Commission, as envisaged by ss3(1A); 21(1)(h) and 82 of the SA Competition Act, can be called in aid to preclude the Competition Commission's oversight of the impugned conduct.

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<sup>20</sup> Competition Act, s10(4).

<sup>21</sup> Competition Act, ss3(1A); 21(1)(h) and 82.

<sup>22</sup> Generally, see P Sutherland and K Kemp *Competition law of South Africa* (2000) 4-46 – 52.

<sup>23</sup> OECD op cit note 5 at 31.

<sup>24</sup> A de Streel 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' (2008) available at <https://pdfs.semanticscholar.org/2d16/db27d8d021ff051e653cfd039549664b8453.pdf>, accessed on 1 March 2019; P Congedo 'The "regulatory authority dixit" defence in European competition law enforcement' (2014) MPRA Paper No. 60239 available at [https://mpa.ub.uni-muenchen.de/60239/1/MPRA\\_paper\\_60239.pdf](https://mpa.ub.uni-muenchen.de/60239/1/MPRA_paper_60239.pdf), accessed on 1 March 2019; RD Nair et al 'The inter-relationships between regulation and competition enforcement in the South African liquid fuels industry' (2015) 26(1) *Journal of Energy in Southern Africa* 11-19; M Hellwig 'Competition Policy and Sector-Specific Regulation for Network Industries' (2008) available at <https://pdfs.semanticscholar.org/b0ae/a9587db5efbcd8b21ba5aeb3b6bc67a82f6.pdf>, accessed on 1 March 2019.

The complementarity approach has also found roots in Nigeria. The Nigerian competition policy recognises the existence of copyright but states that in implementing the Nigerian Competition Act, ‘measures would be taken to ensure that the rights conferred by [copyright] laws, though treasured, are not exercised in a manner that will undermine the principles’ of competition law.<sup>25</sup> The policy recognises the existence of sector-specific regulators saddled with competition-related concerns within their enabling regulations. Hence, it proposes an arrangement wherein sector-specific regulators will continue to address the competition-related concerns within their specific sectors while creating a synergy with the proposed competition authority in addressing competition-related issues beyond, but including, their specific sectors.<sup>26</sup>

While being shaped by the foregoing, the Nigerian Competition Act adopts an approach that is not easy to pigeon-hole. It provides exception from the prohibitions relating to restrictive agreements for certain undertakings. Copyright firms are not included on the list.<sup>27</sup> However, it contains a special exemption in respect of patent licenses as follows:

‘Nothing contained in this Act [...] shall affect the validity, as between parties to an agreement and their successors, of any term or condition of – (a) a license granted by the proprietor of a patent or a licensee under any such license; or (b) any assignment of a patent so far as it regulates the price at which goods or services processed by the licensee or assignee may be sold by him’.<sup>28</sup>

Even so, the Nigerian Competition Act seeks to make its provisions supreme over other laws, except the Constitution of the Federal Republic of Nigeria, 1999, in relation to competition issues in Nigeria. For this purpose, it stipulates that the Federal Competition and Consumer Protection Commission (FCCPC), established under s3 of the Nigerian Competition Act, will have precedence over sector-specific regulators in competition matters.<sup>29</sup> Yet, it confers concurrent jurisdiction on the FCCPC with sector-specific regulators in competition related matters.<sup>30</sup> To create harmony and synergy in exercise of this concurrent jurisdiction, the Nigerian Competition Act provides for an agreement as that provided in the SA Competition Act.<sup>31</sup> The aim of this agreement is to give effect to the general exemption provided for in s106 of the

<sup>25</sup> Federal Government of Nigeria *Draft Competition and Consumer Protection Policy* (2014) 34.

<sup>26</sup> *Ibid* at 45-7.

<sup>27</sup> Nigerian Competition Act, s68.

<sup>28</sup> Nigerian Competition Act, s64(3).

<sup>29</sup> Nigerian Competition Act, s104.

<sup>30</sup> Nigerian Competition Act, s105.

<sup>31</sup> Nigerian Competition Act, s105(4).

Nigerian Competition Act. In terms of the section, an undertaking against which a complaint is made may show that the act complained against was authorised under a sector-specific regulation. In such situations, subject to the existence of an agreement between the FCCPC and the sector-specific regulator, the FCCPC may issue a cease-and-desist order.

The foregoing provisions of the Nigerian Competition Act, like those of the SA Competition Act has no doubt created a basis for the sector-specific regulation defines to competition law intervention. Overall, the implication of the foregoing discussion is that the existence of provisions that address CMOs' competition concern in the copyright sector-specific regulations in Nigeria and South can act as foundation for the agreements proposed in the respective competition legislations, such that there will not be need for competition law oversight over CMOs in both countries. This is so because, as contended in 2.5 above, copyright regulatory frameworks would be suited to oversee the conducts of CMOs. However, it first has to be determined whether the copyright regulatory regimes contain rules that can be deployed to address CMOs' the competition concerns already identified in the opening of this chapter.

### **5.2.1 How copyright and competition law interface**

The justification for copyright protection has been extensively examined elsewhere and does not need repeating here.<sup>32</sup> It suffices to recall the discussion in chapter two (2.4), and restate that there are mainly four theories advanced to justify copyright: the utilitarian theory, natural rights theory, economic theory, and social planning theory. Two broad goals of copyright law can be gleaned from these theories. There is, firstly, the immediate end of enabling creators gain some reward or compensation for their creative endeavours.<sup>33</sup> In this sense, copyright law bestows on creators some "monopoly" over their creation. The monopoly should not be understood in terms of competition law. It is an intangible property right: copyright owners' exclusive rights by which they are enabled to exclude third parties from the use of their creation subject to conditions, including royalty payments. In basic economic terms, copyright law could be regarded as aiming to solve a public goods problem by empowering copyright owners to charge a price higher than the marginal cost of producing their works. This

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<sup>32</sup> Generally, see W Fisher 'Theories of intellectual property law' available at <https://cyber.harvard.edu/people/ufisher/iptheory.pdf>, accessed 28 June 2018.

<sup>33</sup> JT Cross and PK Yu 'Competition law and copyright' (2008) 56 *Dr. LR* 427-462 at 429.

serves as an incentive for the production of more works resulting in reduction of the cost of access to the works.<sup>34</sup> In this regard and from a competition perspective, copyright law may be seen as promoting static competition, which ‘manifests itself in the form of multiple providers of existing products offered at low prices, offering an unchanging menu of unimproved products at very good prices’.<sup>35</sup> However, viewed from this perspective alone, copyright law may be misrepresented as conferring rights on creators of any work whether or not it meets the required threshold for protection, including a mere copy of an original work.

Thus, it is important to approach copyright law broadly to include its long-term goal of preserving public interest through the promotion of creativity; and the maintenance of the requisite balance in the knowledge economy.<sup>36</sup> It does so by conferring copyright owners with exclusivity over their works, subject to substantive and time-based limitations and exceptions.<sup>37</sup> The exclusivity typically enables creators to permit, or refuse, uses of their works and request payment from users as condition for access to their creations. Copyright limitations and exceptions, however, provide opportunities for users to access and re-use copyright works without permission and at no cost. As such, they may be regarded as “incentives” against infringing copyright.

Further, copyright law recognises that ideas fly freely and that the same idea may be shared by several persons.<sup>38</sup> Hence, it does not confer exclusive right over ideas. It is immaterial to copyright law that similar ideas run across each works in so

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<sup>34</sup> WM Landes and RA Posner ‘An economic analysis of copyright law’ (1989) 18(2) *JLS* 325-363 at 326-8.

<sup>35</sup> JG Sidak and DJ Teece ‘Dynamic competition in anti-trust law’ (2009) 5(4) *JCLE* 581-631 at 602.

<sup>36</sup> Cross and Yu op cit note 33.

<sup>37</sup> For general discussion of copyright exceptions and limitations, see P Samuelson ‘Justification for copyright limitations & exceptions’ available at [https://www.law.berkeley.edu/files/Justifications\\_for\\_Copyright\\_Limitations\\_and\\_Exceptions\\_-\\_Pamuela\\_Samuelson.pdf](https://www.law.berkeley.edu/files/Justifications_for_Copyright_Limitations_and_Exceptions_-_Pamuela_Samuelson.pdf), accessed on 26 April 2018; LR Patterson and SW Lindberg *The Nature of Copyright: A Law of Users’ Rights* (1991); T Schonwetter ‘Safeguarding a fair copyright balance – contemporary challenges in a changing world: lessons to be learnt from a developing country’s perspective’ (PhD Thesis, University of Cape Town, 2009); LP Loren ‘The nature of copyright: a law of users’ rights by L. Ray Patterson and Stanley W. Lindberg’ (1992) 90(6) *MLR* 1624-1633; S Flynn ‘Copyright legal and practical reform for the South African film industry’ (2015) 16 *The AJIC*; D Vaver ‘Copyright defences as user rights’ (2013) 60(4) *JCSU* 661-672; DJ Gervais ‘Making copyright whole: A principled approach to copyright exceptions and limitations’ (2008) 5(1&2) *UOLTJ* 1-41; M Geist (ed.) *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013); T Schonwetter ‘The implications of digitizing and the Internet for “fair use” in South Africa’ (LLM Thesis, University of Cape Town, 2005).

<sup>38</sup> B Andersen, et al ‘Copyrights, competition and development: the case of the music industry (2000) available at [http://unctad.org/en/docs/dp\\_145.en.pdf](http://unctad.org/en/docs/dp_145.en.pdf), accessed 28 April 2018.

far as they are expressed differently. It only protects the form in which these ideas are expressed. In effect, copyright law accepts that several similar and substitutable works may be in existence and yet each work will find protection under the law as long as each of them is original to the creator and not merely a copy of the other.<sup>39</sup> The concept of originality under copyright law must be distinguished from novelty. Copyright envisages that creators of new works may draw from existing works insofar as the new works are original. The test for originality differs among national jurisdictions depending on whether the national jurisdiction adopts the civil or common law tradition, detailed discussion of which is beyond the scope of this thesis.<sup>40</sup> However, it should be noted that there are principally two approaches to the originality question. On the one hand, is the objective test of “Sweat of the brow”, which has its roots in the common law tradition. Under this approach, for a work to be original, the author must have exerted sufficient (and not just trivial) degree of skill and labour in the creation of the work. On the other hand, is the subjective or creativity test established in the civil law tradition. In determining originality, this test ‘requires searching not for evidence of skill and labour but rather for the mark of the author’s personality in the work’.<sup>41</sup> The test for originality in Nigeria and South Africa follows the common law tradition.<sup>42</sup> However, the Canadian intermediate approach of ‘skill and judgment’ adopted in the celebrated *CCH Canadian Ltd v Law Society of Upper Canada*<sup>43</sup> case seems to be lurking around the South African copyright jurisprudence as recent judicial pronouncement in *Moneyweb v Media24* shows.<sup>44</sup> In that case, the Gauteng High Court found that ‘while [South African] law still regards the time and effort spent by the author as a material consideration in determining originality [...] the time and effort spent must involve more than a mechanical, or slavish, copying of existing material. In other words, there must be sufficient application of the author’s mind.’<sup>45</sup>

This being said, flowing from the utilitarian and social planning justification, copyright law ensures the continuity of creativity for consumer (societal) welfare. It

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<sup>39</sup> A Katz ‘Substitution and Schumpeterian effects over the life cycle of copyrighted works’ (2009) 49 *Jurimetrics* 113-153.

<sup>40</sup> For a discussion of the concept of originality, DJ Gervais ‘Feist goes global: A comparative analysis of the notion of originality in copyright law’ (2002) 49(4) *JCSU* 949-981.

<sup>41</sup> Gervais *Ibid*.

<sup>42</sup> *Anikulapo-Kuti v Iseli* [2003-2007] 5 I.P.L.R. 53-73; *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* [2006] SCA 39 (RSA).

<sup>43</sup> [2004] 1 SCR 339.

<sup>44</sup> [2016] 3 All SA 193.

<sup>45</sup> *Moneyweb* *supra*, para 15.

does so by prohibiting competition by imitation, copying or creation of perfect substitutable works; while promoting competition by the making of imperfect substitutable works.<sup>46</sup> It prohibits the making of new works which are mere copies (perfect substitutes) of existing works by empowering owners of the existing works to sue for infringement against the makers of the mere copies. Also, it allows the creation of new works expressing similar ideas in forms different (imperfect substitutes) from existing works by preventing owners of the existing works from restricting the creation of the new works. Hence, copyright promotes the creative spirit of creators leading to the production of equally creative but imperfectly substitutable works allowing users, based on their taste, to choose which work to use at every point in time. This way, copyright law promotes dynamic competition or ‘Schumpeterian competition’,<sup>47</sup> which is a ‘style of competition that relies on [creativity] to produce new products and processes and concomitant price reductions of substantial magnitude. Such competition improves productivity, the availability of new goods and services, and, more generally, consumer welfare’.<sup>48</sup> In effect, copyright law serves the same goal as modern competition law.

Competition law is generally meant to enhance consumer welfare in a given market by promoting competition. It deploys the rules against abuse of dominance, restrictive agreements and control of mergers to ensure that competition is not stultified in the market. Competition law does not abhor monopoly obtained by innovation or creativity.<sup>49</sup> This argument forms the justification for the acceptance of CMOs by competition courts as not *per se* illegal monopolies, as stated in 5.1 above. Even so, competition law ensures that such monopoly is not exercised to bring about unfair trade and prevent free movement of goods and services within the market. In this regard, competition law may be seen as preferring the existence of several firms within a market competing against each other for consumers while offering similar goods and services at lower prices. However, the presence of more than one active firm in a market may not ordinarily be evidence of competition.<sup>50</sup> This is so because ‘[e]ven without restrictive agreements, specific market circumstances may cause firms not to compete.

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<sup>46</sup> Drexl op cit note 9 at 75; Katz op cit note 39.

<sup>47</sup> Katz *ibid*.

<sup>48</sup> Sidak and Teece op cit note 35 at 600.

<sup>49</sup> Pham op cit note 8; *Pioneer Hi-Bred International v CompCom SA* [2012] ZACAC 3, para 52.

<sup>50</sup> J Drexl ‘Collecting societies and competition law’ (2007) 6 available at [http://www.ip.mpg.de/shared/data/pdf/drexl-cmos\\_and\\_competition.pdf](http://www.ip.mpg.de/shared/data/pdf/drexl-cmos_and_competition.pdf), accessed 20 October 2014.

In an oligopolistic market in particular, the limited number of firms may well behave just like a monopolist'.<sup>51</sup> Thus, 'whereas classical economics' which shaped competition law is usually concerned about 'price and output', it is possible to 'develop a competition policy that focuses on the dynamic factors of competition' which will be in sync with the goals of copyright law.<sup>52</sup> Indeed, modern competition law promotes dynamic competition 'powered by the creation and commercialisation of new products, new processes and new business models'.<sup>53</sup> The emphasis is not on the availability of similar products at reduced price but the existence of 'new products and the co-creation of new markets that allow latent demand to be realised by consumers',<sup>54</sup> and bring about dynamic and efficient resource allocation.<sup>55</sup>

In this regard, competition law may be likened to copyright limitations and exceptions. It helps copyright law to promote the public interest by ensuring that the exclusive right which copyright law confers on copyright owners is not exercised to prevent dynamic competition in a given copyright market.<sup>56</sup> Put differently, competition law ensures that copyright is exercised efficiently and to the promotion of consumer welfare in a given market.<sup>57</sup> Katz observed that competition policy had always been at the heart of copyright legislation.<sup>58</sup> Copyright law's internal mechanisms like fair dealing and fair use exceptions; the idea/expression dichotomy; the first sale doctrine (principle of exhaustion),<sup>59</sup> and the concepts of originality may be utilised to advance the ends of competition law. These mechanisms may operate to alleviate some of the

'static losses resulting from exclusive rights in two principal ways: [they] constrain copyright owner's market power by forcing it to compete, at the margin, with unauthorised but lawful copies, and [they] may reduce monopoly pricing deadweight loss by permitting users whose willingness to pay is higher than marginal cost but still lower than the price set by the copyright owner to use the work.'<sup>60</sup>

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<sup>51</sup> Ibid at 6.

<sup>52</sup> Ibid at 3.

<sup>53</sup> Sidak and Teece op cit note 35 at 602.

<sup>54</sup> Ibid at 600.

<sup>55</sup> Pham op cit note 8 at 2.

<sup>56</sup> Cross and Yu op cit note 33.

<sup>57</sup> Ibid.

<sup>58</sup> A Katz 'Copyright and competition policy' in R Towse and C Handke eds. *Handbook of the Digital Creative Economy* (2013) 209-221.

<sup>59</sup> Ibid; Cross and Yu op cit note 33. The first sale doctrine (or principle of exhaustion) is a limitation on the exclusive right of a copyright owner. It recognises the right of a user, who acquired the copy of a copyright work, to sell, display or dispose of the particular copy without recourse to the copyright owner. In other words, the doctrine prevents copyright owners from controlling the sale of a copy of their work beyond the initial distribution which they authorised. See S Karjiker 'The first-sale doctrine: parallel importation and beyond' (2015) *Stell LR* 633.

<sup>60</sup> Katz op cit note 58 at 214.

Also, they may mitigate ‘dynamic losses by ensuring that the exercise of the copyright would not hinder downstream creativity and innovation by other authors and users’.<sup>61</sup>

Nonetheless, there is still some tension between both fields of law in view of their different approaches to promoting consumer welfare.<sup>62</sup> Competition law usually involves ‘fact intensive rule of reason analysis of a particular challenged practice and its effects in specifically defined market’. On the other hand, ‘copyright law [...] does not require [the] same rigour’.<sup>63</sup> Consequently, competition law will not apply where the alleged abuse of copyright does not involve market dominance on the part of the copyright owner, whereas copyright exceptions will apply under copyright law regardless of market definition. Further, competition law is not well suited to curb the harm that copyright law principally seeks to tackle.<sup>64</sup> It seems to favour a party against whom copyright law would ordinarily be deployed: that is, a user of copyright work. In this regard, competition law can be regarded as a shield in that the user may rely on an order to deal, issued against the copyright owner under competition law, as excuse for using the work without the copyright owner’s authorisation. However, it is better regarded as a sword because a user intending to rely on competition law to compel the copyright owner to license works, for example in cases of refusal to license, would have to initiate a different procedure under the competition legislation.<sup>65</sup> Although such a person may obtain some remedy under competition law, the person cannot escape liability under copyright law merely by reason of success under competition law,<sup>66</sup> since competition law cannot annul or suspend copyright.<sup>67</sup> This scenario may arise, for example, in complaints of excessive royalty rates against a copyright owner. Whereas the royalty rate may be declared as excessive under competition law, the user may still be liable to pay a rate determined as more reasonable and less excessive for the use of the work. Such liability of the user is hinged on the copyright exclusivity, which competition law does not seek to displace.

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<sup>61</sup> Ibid.

<sup>62</sup> Drexl op cit note 9 at 40.

<sup>63</sup> Katz op cit note 58 at 217.

<sup>64</sup> Ibid.

<sup>65</sup> Cross and Yu op cit note 33 at 454-455.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.



### 5.2.2 Application of competition law to the exercise of copyright

The Max Planck Report finds that competition law prevents anticompetitive exercise of copyright in two ways. First, the ‘restrictive approach’ reflects competition law’s ability to limit the exercise of copyright exclusivity. Such role exists under the rules against ‘abuse of market dominance’ which ‘may specifically be applied to the effect of imposing a duty to license’ on the copyright owner.<sup>68</sup> Competition law’s ‘proactive approach’ forms ‘part of a more holistic government policy that does not purely rely on the prosecution of copyright infringement’ to curb piracy.<sup>69</sup> It is more apparent in the rules against market sharing, market foreclosures and price-fixing agreements by copyright owners. Such agreements have the tendency to act as barriers to market entry and may lead to copyright infringement if not tackled. The agreements may cause users to deploy any means, which may amount to copyright infringement, to get around the entry barriers. Competition law steps in by tackling such restraints with the effect of preventing copyright infringement.

Overall, competition law’s application to the exercise of copyright may generally come under any of the sub-areas of restrictive agreements, abuse of market dominance and merger control.<sup>70</sup> Specifically, it may

‘appear in three kinds of more specific rules that define anticompetitive conduct, namely: (1) in the framework of essential-facilities provision, (2) in more specific provisions on compulsory licensing systems and (3) in provisions that address [copyright] as factors for market entry barriers in the framework defining the concept of market dominance or in the framework of merger control provisions’.<sup>71</sup>

However, within competition law’s context, copyright is ordinarily viewed as not capable of conferring market power on its owner.<sup>72</sup> Thus, for competition law to apply, it has to be established that the copyright owner has market power in a given copyright market, which has been or is being exercised anti-competitively in the market. While this may be possible – albeit rarely – in the case of original copyright owners acting individually because of the existence of imperfect substitutable works,<sup>73</sup> it would easily be manifested in cases where the copyright owner acquired his rights from various

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<sup>68</sup> Drexl note 9 at 40.

<sup>69</sup> Ibid at 44.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid at 67.

<sup>72</sup> Hovenkamp, et al op cit note 8 at 1.5. However, see a contrary argument in Katz op cit note 58.

<sup>73</sup> NW Netanel ‘Copyright and ‘market power’ in the market place of ideas’ in F Macmillan (ed) *New Directions in Copyright Law* Vol 4 (2007) 149-179.

copyright owners, thus controlling a large repertoire. CMOs stand as ready examples in this regard. CMOs' competition issues are discussed in 5.3 below.

#### 5.2.2.1 *Restrictive agreements*

Restrictive agreements may be horizontal or vertical.<sup>74</sup> A copyright-related agreement is horizontal when it involves, for instance, agreement between creators (authors and performers), book publishers or between film producers; and vertical where, for instance, it is between a film producer and a distributor or a multiplex, as the case may be. Restrictive agreements in a copyright market have been identified to include price-fixing agreements; market sharing agreements; resale-price maintenance agreements; and bid-rigging agreements or collusive tendering. Other forms of restrictive agreements identified are bundled marketing of copyright works; exclusive vertical distribution agreements especially where one or more of the parties occupies a dominant position in the copyright market; and market-foreclosure agreements.<sup>75</sup> Although, it appears market-foreclosure agreements may also fall under abuse of dominance prohibition.<sup>76</sup>

The SA Competition Act, as well as the Nigerian Competition Act, generally prohibits restrictive agreements. Specific prohibitions relate to price-fixing agreements; market sharing agreements; market-foreclosure agreements; resale-price maintenance agreements; bid-rigging agreements or collusive tendering.<sup>77</sup> However, it appears from the provisions that these prohibitions would be examined by a court under the 'rule of reason', and not the '*per se* rule', approach.<sup>78</sup> Under the 'rule of reason' approach, courts would have to 'balance the anti-competitive effects of the challenged practice against any pro-competitive effects of the practice, as well as any economic reasons justifying the practice. If the procompetitive effects outweigh the anticompetitive effects, the practice does not violate [competition] law'. But under the

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<sup>74</sup> L Vogel and J Vogel 'Survey on Vertical Agreements in 2017 – Is the Rigid Application of Competition Law to Distribution Agreements Going to Kill the Buyer–Reseller Model?' (2017) 8(9) *Journal of European Competition Law and Practice* 604-612; J Goyder '*Cet Obscur Objet*: Object Restrictions in Vertical Agreements' (2011) 2(4) *Journal of European Competition Law and Practice* 327-339.

<sup>75</sup> Drexler op cit note 9, at 82-108.

<sup>76</sup> see SA Competition Act, ss 8(c) and 1.

<sup>77</sup> SA Competition Act, ss 4 and 5; Nigerian Competition Act, ss 59, 61, 62, 63 and 65.

<sup>78</sup> Competition Act, ss 4(1) and 5(1); HCB, clauses 59(1) and 60. See also Cross and Yu op cit note 33. However, see the ruling in *Glaxo Wellcome (Pty) Ltd v NAPW* [2002] ZACAC 3, discussed shortly.

‘*per se* rule’, competition law liability exists even if evidence of anticompetitive effect of the challenged act is lacking.<sup>79</sup>

That being said, the Max Planck Report found that the case law and practice on competition law’s regulation of restrictive agreements on ‘copyright-related markets can hardly be fully captured by the category of licensing agreements’. Nonetheless, competition law’s regulation of restrictive agreements in copyright markets ‘has the potential of promoting access to works for consumers by keeping prices low and guaranteeing open markets’.<sup>80</sup> This will become obvious through the cases considered below touching mainly on price fixing, market sharing and market-foreclosure agreements. The cases are also significant in that they show the how absence of competition rules in a sector-specific industry regulatory framework can necessitate competition law intervention in such industry.

The Indian case of *M/s HT Media Ltd v M/s Super Cassettes Industries Ltd* (HT Media)<sup>81</sup> involved a complaint by HT Media against Super Cassettes alleging abuse of dominance (excessive pricing) and restrictive agreements under ss4 and 3 respectively of the Indian Competition Act. HT Media operates a FM radio channel with strong listenership, which largely airs Bollywood music. Super Cassettes is a dominant firm in the ‘market for licensing of Bollywood music to private FM radio stations for broadcast in India’,<sup>82</sup> which is the relevant market in this case. HT Media obtained a broadcast licensing agreement from Super Cassettes over Super Cassettes’ Bollywood music. The licensing agreement contains certain conditions including the requirement of minimum commitment charges (MCC) from HT Media. The MCC has the effect of restricting around 30-50% of HT Media music broadcast to Super Cassette’s music content. The Competition Commission of India distinguished between exploitative and exclusionary pricing abuse that may come under abuse of market dominance. Although, it noted that the setting of excessive prices forms a classic case of exploitative pricing abuse,<sup>83</sup> the Competition Commission of India did not find a case of excessive pricing against Super Cassettes.<sup>84</sup> However, it concluded that the agreement amounted to imposition of unfair conditions under s4(2)(a)(i) Indian

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<sup>79</sup> Cross and Yu Ibid at 443 and 445.

<sup>80</sup> Drexl op cit note 9 at 108.

<sup>81</sup> CCI Case No. 40 of 2011 (1 October 2014).

<sup>82</sup> Ibid, para. 158.

<sup>83</sup> Ibid, para. 196.

<sup>84</sup> Ibid, para.199.

Competition Act.<sup>85</sup> In so doing, the Competition Commission of India observed that the MCC condition has the effect of foreclosing the relevant market against other competitors. According to the Competition Commission of India, the

‘MCC [...] is exploitative and exclusionary in nature. It is exploitative as it forces the customers to pay for music that it may not play. Exclusionary conduct is characterised by improper strengthening of market power by the dominant enterprise. [...] the imposition of MCC [...] *has an anti-competitive effect on the market as it forecloses other competitors from a substantial share of the market.* Since [MT Media] is contractually bound to pay [Super Cassettes] a minimum guarantee, they are likely to broadcast the amount of music that they have already paid for. Therefore, a certain amount of music playout on private FM radio stations is already fixed for [Super Cassettes]. This results in [Super Cassettes]’ competitors not being able to compete for and being foreclosed from broadcasting their music on this prefixed playout of 30-50% reserved for [Super Cassettes]’.<sup>86</sup>

Interestingly, Super Cassettes sought to escape liability under the Indian Competition Act by recourse to copyright by raising the sector-specific industry regulation defence. It argued, among others, that the case comes under copyright licensing for which the Indian Competition Act had no jurisdiction since the Indian Copyright Act empowered its Copyright Board to determine the reasonableness of licensing fees; and that the case involves copyright which cannot be classified as a ‘good’ or ‘service’ under the Indian Competition Act. While noting the Copyright Board’s powers under the Indian Copyright Act, the Competition Commission of India noted that a copyright licensing agreement may amount to abuse if it contains one sided, discriminatory or unfair terms; and that such abuse of dominance cases are outside the purview of the Indian Copyright Act.<sup>87</sup> However, the CCI did not pronounce on whether copyright qualifies as a good or service under the Indian Competition Act.

Another Indian case, *FICCI-Multiplex Association of India v UPDF*, demonstrates how competition law regulates price fixing agreements by copyright owners.<sup>88</sup> FICCI-Multiplex is an association of multiplex owners, while UPDF is an association of Hindi films producers and distributors. UPDF members control 100% of the relevant market, which is the market for the production and distribution of Hindi films in multiplexes in India. UPDF’s members collectively agreed not to release films to FICCI-Multiplex members for a given period until they could extract a more favourable revenue sharing formula from FICCI-Multiplex members. The collective

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<sup>85</sup> Ibid, para. 215.

<sup>86</sup> Ibid, para. 206. Italics mine.

<sup>87</sup> Ibid, para. 127.

<sup>88</sup> CCI Case No. 01 of 2009 (25 May 2011).

agreement also resulted in obtaining higher prices from FICCI-Multiplex members. The case was considered by the Competition Commission of India under s3(3) Indian Competition Act (restrictive agreement). The UPDF raised the sector-specific industry regulation defence and argued that the agreement amounts to exercise of its members' copyright in cinematograph works under the Indian Copyright Act; and that exercise of copyright, which is within its members' discretion, is beyond the purview of the Indian Competition Act.<sup>89</sup> In this regard, the UPDF sought to rely on s3(5) of the Indian Copyright Act, which excludes from competition law's oversight, a copyright owners' right to restrain infringement of, or to impose reasonable conditions necessary to protect their copyright. The Competition Commission of India rejected this argument because copyright infringement or protection does not arise in cases falling squarely within the realms of price-fixing agreement. In any event, held the Competition Commission of India, FICCI-Multiplex members are only facilitating the copyright of UPDF members by seeking to release their films in multiplexes.<sup>90</sup> Specifically, the Competition Commission of India stated that

'[copyright] laws do not have any absolute overriding effect on competition law. The extent of [the exclusion] clause in section [3(5) Indian Competition Act] is not absolute [...] and it exempts [copyright owners] from the rigours of competition law only to protect [their copyright] from infringement. It further enables [copyright owners] to impose *reasonable conditions, as may be necessary for protecting such rights*'.<sup>91</sup>

The Competition Commission of India declared the agreement as being in contravention of s3(3) Indian Copyright Act. In so doing, it also took cognisance of the fact that the agreement resulted in price hike of tickets in multiplexes to the detriment of consumers; and that the agreement does not in any way 'increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services'.<sup>92</sup>

The facts of the recent South African (SA) Competition Tribunal judgment in *Competition Commission v Primedia Ltd & Anor* manifests market sharing agreements in a copyright market.<sup>93</sup> The case was a referral by the SA Competition Commission. The SA Competition Commission's case was that Ster-Kinekor Theatres (a division of the first respondent) and Nu Metro Cinemas (owned by Nu Metro Entertainment, a

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<sup>89</sup> Ibid, para. 23.11.

<sup>90</sup> Ibid, paras. 23.28 and 23.29.

<sup>91</sup> Ibid, para. 23.30.

<sup>92</sup> Ibid, para. 23.36 and 23.37.

<sup>93</sup> Unreported case no CR191Mar12 (5 February 2018).

division of the second respondent) had entered into and were executing a market sharing agreement in contravention of s4(1)(b)(ii) of the SA Competition Act. In May 1998 Ster-Kinekor and Nu Metro agreed on the genre of films they would both exhibit in their cinemas in different parts of the V&A Waterfront in Cape Town. The agreement was the product of settlement between both parties based on a dispute that arose between Nu Metro and the landlord of V&A Waterfront about who had the right of first offer of a lease agreement on the premises. Nu Metro was the original lessee. At the expiration of its lease, it got wind that the landlord was going to lease the premises to Ster-Kinekor, hence the dispute that led to the agreement. The agreement was entered as judgment of the High Court in September 1998 before s4(1)(b)(ii) of the SA Competition Act came into force.

The effect of the exercise of copyright was not in issue in the case. Nevertheless, the case is relevant because it raises the issue of whether the agreement entered into by firms at the distribution chain of the copyright market amounted to market sharing agreement. Sadly, the opportunity was lost as the SA Competition Tribunal did not determine the issue because it found that the agreement predated s4(1)(b)(ii) of SA Competition Act; and that the parties did not implement the agreement after the coming into force of s4(1)(b)(ii) of the SA Competition Act.<sup>94</sup>

The complaint against Aspen Pharmacare Holdings Limited, Mylan Laboratories Limited, Mylan South Africa Incorporated and Mylan Incorporated (*Aspen and Mylan* case) is also important in this regard.<sup>95</sup> Although not related to copyright, it demonstrates how the provisions of the SA Competition Act relating to horizontal and vertical agreements (market sharing agreements) may be applied in cases involving exclusive licenses over an IP right. The complaint was brought by Doctors Without Borders (Complainant) before the SA Competition Commission in 2012. Aspen and Mylan are two global companies, with presence in South Africa, involved in the production and supply of generic pharmaceutical products. Apart from its fixed dose combination antiretroviral drugs (ARD), Mylan's business includes the production of active pharmaceutical ingredients (API) used in the production of ARTs. Aspen and Mylan entered into exclusive supply agreements in 2008 which was to

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<sup>94</sup> Ibid, para. 41-42.

<sup>95</sup> For summary of the complaint, see Competition Commission 'Commission Non-Refers Doctors Without Borders Complaint' (16 September 2014) available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Commission-non-refers-Doctors-Without-Borders-complaint.pdf>, accessed 11 May 2018.

endure till 2016 and which involved the supply of Mylan's API and fixed dose combination ARD in South Africa. In terms of the agreements, Mylan was to exclusively license its API to Aspen and refrain from bringing its fixed dose combination ARD to the South African market. The agreement also prevented Mylan from supplying its API to any other South African companies. Essentially, the agreements made Aspen the exclusive supplier of Mylan's API and fixed dose combination ARV in the South African market. The Complainant's case is that apart from lessening competition in the South African market for API and fixed dose combination ARD, the negotiations between Aspen and Mylan amounts to price fixing agreement which would effectively affect the price of fixed dose combination ARD in the market. On receiving the complaint, the SA Competition Commission included another complaint of market allocation on the belief that the agreements possible amounted to market sharing agreement between competitors. Both complaints were investigated together.

In the course of investigation, the SA Competition Commission identified two markets: the upstream market for the production and supply of APIs and the downstream market for the production and supply of ARD 'to the public sector through a tender process'. The SA Competition Commission dismissed the price-fixing allegation as it found no supporting evidence. On the prevention/lessening of competition allegation, the SA Competition Commission found that although the agreements prevent Mylan from entering the upstream and downstream markets, it does not lessen competition since Aspen has other competitors who could purchase API and the fixed dose combination ARD from other manufacturers apart from Mylan. Further, the SA Competition Commission's interpretation of the 'no-compete clause' in the agreement between Aspen and Mylan was not sufficient to ground its allegation of market allocation under the SA Competition Act. Overall, the SA Competition Commission found that the agreements could lead to efficiencies which would outweigh its anticompetitive effects in the market. For example, it found that Aspen was 'awarded a large portion of the 2008 ARV tender and needed to ensure that it had guaranteed access to the ARV-APIs in order to meet its obligations in terms of the tender'. Importantly, the SA Competition Commission found that Aspen and Mylan mutually terminated the agreements in 14 February 2013. In view of the foregoing, the

SA Competition Commission did not refer the complaint to the SA Competition Tribunal.<sup>96</sup>

### 5.2.3.2 Abuse of market dominance

As noted in *HT Media*, a dominant firm may abuse its position by engaging in exclusionary or exploitative conduct. Whereas refusal to deal (refusal to supply scarce goods or refusal to license), predatory pricing, loyalty rebates and pricing squeeze form examples of exclusionary conducts, excessive pricing forms classic case of exploitative conducts. In relation to copyright, abuse of dominance may also take other forms, such as false assertion of copyright and sham litigation (monopolisation without dominance); control of dominant customers, and price discrimination by dominant copyright holders.<sup>97</sup>

Most competition statutes do not differentiate between exclusionary and exploitative conduct. Nonetheless, the distinction is necessary because there are different approaches to abuse of dominance in different major competition law jurisdictions. For instance, abuse of dominance falls under the rules on monopolisation in the US, which focus only on exclusionary conducts. EU law, in terms of art.102 of the TFEU, encompasses both types of conduct.<sup>98</sup> The SA Competition Act and the Nigerian Competition Act, which are similarly worded, adopt the EU approach. They address both exclusionary and exploitative conducts as abuse of dominance.<sup>99</sup> Overall, from a copyright point of view, abuse of dominance rules do not only

‘play a role with regard to dominant [copyright owners] but also with regard to dominant distributors who, in particular, control bottleneck technologies and therefore may make it more difficult and more expensive for works to reach consumers. Hence, [in this regard], competition law enforcement can contribute to the distribution of works and thereby support the goals of copyright [law].’<sup>100</sup>

The SA Competition Tribunal had an opportunity to apply the abuse of dominance rule (refusal to grant access to essential facility) to a copyright related mater

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<sup>96</sup> Ibid.

<sup>97</sup> F ten Have and S de Jong ‘*Orange Polska v Commission: Abuse of Dominance, Fines & Effects*’ (2018) 9(10) *Journal of European Competition Law and Practice* 647; M Gianino ‘Regulated Industries: Abuse of Dominant Position in the Market for Block Train Services (France)’ (2013) 4(6) *Journal of European Competition Law and Practice* 498.

<sup>98</sup> L Hou ‘Excessive Prices Within EU Competition Law’ (2011) 7(1) *European Competition Journal* 47-70.

<sup>99</sup> SA Competition Act, s8-9; Nigerian Competition Act, ss70-73.

<sup>100</sup> Drexel op cit note 9 at 177.



in *DW Integrators v SAS Institute (Pty) Ltd.*<sup>101</sup> The respondent was a distributor of information delivery software in South Africa, while the complainant provided consulting services to licensed users of the respondent's software. The complainant and the respondent entered into a partnership agreement whereby the respondent undertook, among others, to recommend the complainant to its customers. The agreement was based on the complainant obtaining a license to the respondent's software in terms of the respondent's standard licensing agreement. The partnership along with the software license was later terminated by the respondent. The complainant filed a complaint with the SA Competition Commission on the ground that the respondent contravened s8(b) and (c) of the SA Competition Act.

Section 8(b) of the SA Competition Act prohibits refusal to 'give a competitor access to an essential facility when it is economically feasible to do so.' And 'essential facility' is defined as 'an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods and services to their customers'.<sup>102</sup> Section 8(c) is a general prohibition of exclusionary acts shown to have anticompetitive effects which outweigh their technological, efficiency or other procompetitive gains.

The complainant alleged that the respondent terminated the licensing agreement and therefore deprived it of an essential facility (the software), among others, because the respondent intended to enter the consultancy market. The complainant also alleged that the respondent held a dominant position in the information delivery software market. Based on the complaint filed before the SA Competition Commission, the complainant brought an application for interim relief before the SA Competition Tribunal under s59 of the SA Competition Act. To grant such relief, it has to be established that the respondent occupied a dominant position which is being abused by the alleged exclusionary conduct; that absent the relief, the complainant will incur irreparable loss and the purpose of the SA Competition Act will be defeated; and that the balance of convenience favours the grant of the relief.<sup>103</sup> However, the SA Competition Tribunal could not examine the allegation of abuse of dominance because it found, contrary to the complainant's claim, that the respondent's dominance was not

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<sup>101</sup> Supra note 10.

<sup>102</sup> SA Competition Act, s1.

<sup>103</sup> Supra note 10, para. 3.

‘established in the market for information delivery software, and [...] in the relationship between the parties’.<sup>104</sup>

Although focusing on patent law, two interesting cases are worth referencing because of their relevance to the present discussion. There is the very widely reported case of *Hazel Tau v Glaxo and Boehringer*,<sup>105</sup> which was a complaint to the SA Competition Commission on the ground that the respondents were charging excessive prices for their anti-retroviral therapy needed for the management of HIV. The complainants also alleged that the respondents failed to grant reasonable royalties over their patents covering medicines making up anti-retroviral therapy for free and non-discriminate access to the anti-retroviral therapy. Upon investigation, the SA Competition Commission confirmed the alleged excessive pricing and found a case of denial of access to essential facilities against competitors by the respondents in contravention of s8 of the SA Competition Act. Thus, the SA Competition Commission announced its intention to refer the matter to the SA Competition Tribunal for an order compelling the respondents to issue licenses for the production of generic medicine making up the anti-retroviral therapy at reasonable royalties. However, the matter never went to the SA Competition Tribunal as the parties settled it without admission of guilt by the respondents. Nonetheless, the SA Competition Commission’s findings seemed to have influenced the settlement, which included the granting of licenses by the respondents to more local pharmaceutical companies at a royalty rate of not more than 5% of the net sales of the relevant antiretroviral medications. According to the SA Competition Commission, the agreement resulted in price reduction of antiretroviral medications.<sup>106</sup> However, compulsory licenses issued against anticompetitive firms under competition law regimes have been regarded as generally attracting zero royalty.<sup>107</sup> By implication, the licenses in this case would have been obtained at a lesser or zero royalty, with the effect of drastic reduction in the price of antiretroviral medication, if the complaint was referred to the SA Competition Tribunal.

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<sup>104</sup> Ibid, para. 31.

<sup>105</sup> Unreported, but discussed in Competition Commission *Years of Competition Enforcement – A People’s Account* (2014) 13-15 available at <http://compcom.co.za/www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf>, accessed on 28 March 2018.

<sup>106</sup> Ibid; Competition Commission ‘South Africa’s Experience in the Pharmaceuticals Industry’ (2015) UNCTAD 5 available at [http://unctad.org/meetings/es/Presentation/CCPB\\_7RC2015\\_RTPharma\\_SouthAfrica\\_en.pdf](http://unctad.org/meetings/es/Presentation/CCPB_7RC2015_RTPharma_SouthAfrica_en.pdf), accessed 10 May 2018.

<sup>107</sup> S Flynn, et al ‘An economic justification for open access to essential medicine patents in developing countries’ (2009) 37 *JLME* 184-209.

Interestingly, an attempt by GlaxoSmithKline to enter the settlement agreement as consent order of the SA Competition Tribunal was rejected because, among other reasons, there was no ‘agreement as to an appropriate order - as envisaged in s49D(1)’ of the SA Competition Act ‘before the period for the referral of the complaint had expired’.<sup>108</sup>

The other case is *Glaxo Wellcome (Pty) Ltd v NAPW*,<sup>109</sup> which is an appeal from the SA Competition Tribunal to the SA Competition Appeal Court. Seven of the appellants were major pharmaceutical companies, while the eighth appellant was a distributor. The respondents were wholesale distributors of the first to seventh appellants’ products. The respondents were getting products from the first to seventh appellant at some discount. However, the first to seventh appellants later appointed the eighth appellant as their agent, upon which they stopped giving products to the respondents on discount. Consequently, the respondents lodged a complaint before the SA Competition Commission alleging abuse of dominance. The Competition Commission failed to refer the matter before the SA Competition Tribunal within the time required by the SA Competition Act,<sup>110</sup> thus, paving the way for the respondents to refer the matter to the SA Competition Tribunal directly. In their referral, the respondents made allegations, among others, of denial of access to an essential facility, the charging of excessive prices, and predatory pricing against the appellants (s8(a) - (c)).

Before filing their answering affidavit to the respondent’s referral, the appellants filed a notice of motion urging the SA Competition Tribunal to strike out some of the paragraphs in the referral as they did not form part of the earlier complaint to the SA Competition Commission. In its ruling, the SA Competition Tribunal struck out the allegations relating to excessive and predatory pricing. It, however, upheld the paragraphs relating to denial of access to an essential facility. The SA Competition Tribunal reasoned that denial of access to essential facility (s8(b)) and refusal to supply scarce goods to a competitor (s8(d)(ii)) are the same thing. It held that, although the

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<sup>108</sup> *GlaxoSmithKline v David Lewis & Ors* [2006] ZACAC 6.

<sup>109</sup> Supra note 75.

<sup>110</sup> The Competition Commission is required to refer a complaint to the Competition Tribunal within one year after the complaint is submitted to it if it determine that a prohibited practice has been established; or issue a notice of non-referral to the complaint if otherwise. However, the time may be extended by agreement between the Competition Commission and the complainant or extended by the Competition Tribunal. Failure of the Competition Commission to refer a complaint to Competition Tribunal or issue a notice of referral after the relevant time can be regarded as issuance of notice of non-referral. See Competition Act, s50(2) and (5).

conduct complained of is made in the context of refusal to supply scarce goods to a competitor, it is to be regarded as denial of access to an essential facility.

The foregoing formed the basis for the appeal. Although the SA Competition Appeal Court did not rule directly on the copyright and competition laws interface, the judgment is important as it gives an insight on how the SA Competition Appeal Court would construe s8(b) and (d)(ii) concerning copyright-related matters.

In its judgment, the SA Competition Appeal Court rejected the position of the Competition Tribunal. It held that under the SA Competition Act denial of access to an essential facility in s8(b) is different from a refusal to supply scarce goods in s8(d)(ii). It further held that the denial of access to an essential facility is not a specie of the refusal to deal.<sup>111</sup> The SA Competition Appeal Court further stressed that like the prohibition of excessive pricing in s8(a), the prohibition of the denial of access to an essential facility in s8(b) falls under the *per se* rule. Conversely, the prohibition of the refusal to supply scarce goods in s8(d)(ii) falls under the rule of reason because ‘it is intended that a firm accused of this conduct be allowed to raise a defence’.<sup>112</sup> It is hard to agree with the SA Competition Appeal Court that the s8(b) prohibition falls under the *per se* rule. A look at s8(b) shows that it contains a similar phrase as that of s8(d)(ii): that is, ‘when it is economically feasible to do so’. Clearly, the law makers envisaged that just like under s8(d)(ii), a firm accused of contravening s8(b) may put up the defence that it is not economically feasible to allow access to essential facility which it has control over. The SA Competition Appeal Court seems to have unconsciously supported this argument in paragraph 57 of the judgement wherein it rightly highlighted the conditions for application of s8(b) as follows:

‘(1) the dominant firm concerned refuses to give the complainant access to an infrastructure or a resource; (2) the complainant and the dominant firm are competitors; (3) the infrastructure or resource concerned cannot reasonably be duplicated; (4) the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resource; and (5) *it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource*’.<sup>113</sup>

The point being made is that while the prohibitions under both subsections may be different, they would both be construed under the rule of reason and not the *per se* rule. The effect of this argument is that cases based on the copyright and competition

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<sup>111</sup> Ibid, para. 56.

<sup>112</sup> Ibid, para. 51.

<sup>113</sup> Emphasis mine.

law interface and falling under the s8(b) prohibition may be considered under the rule of reason. Nonetheless, the general prohibition of exclusionary acts in s8(c) would more readily accommodate copyright related cases.

This being said, the SA Competition Appeal Court gave an insight, albeit indirectly, as to how it would treat copyright under s8(b). The respondents had argued that the appellant's products were essential facilities since they constituted resources that cannot reasonably be duplicated because of the protection afforded by patent and licenses. The SA Competition Appeal Court rejected the submission because it would lead to a broad definition of the essential facility doctrine under s8(b) as follows:

'the clear provisions of the [Competition Act] do not support such an interpretation. For reasons already stated "resource" was not meant to be interpreted as products, goods or services. I cannot agree with the complainants that pharmaceutical products qualify as essential facilities and resources for antitrust purposes. The interpretation relied upon by the [respondents] effectively gives section 8(b) a wide meaning. In my opinion, this broadens the scope of section 8(b) well beyond what was intended by the legislature. [...] The widening of the application and scope of the essential facilities doctrine can have harmful economic effects such as discouraging investment in infrastructure. An investor might be reluctant to invest for fear of a third party demanding a "free ride" on the fruits of such investment'.<sup>114</sup>

In effect, it appears unlikely that the SA Competition Appeal Court would accept a wide definition of the essential facilities doctrine to include copyright.<sup>115</sup> Indeed, copyright in itself may not be regarded as an essential facility. However, information may be contained in a work that is protected by copyright and access to such information would not be possible except the owner of copyright in the work grants access. In such a situation, insistence on copyright exclusivity would prevent access to essential facility (information contained in the protected work), thus bringing the act within s8(b), especially where the copyright owner is in a dominant position within the given market.

The foregoing argument aligns with the CJEU's jurisprudence on the essential facility doctrine applied in copyright-related cases. Notable cases in this regard include *Volvo v Veng*,<sup>116</sup> *RTE and ITP v Commission* (Magill case),<sup>117</sup> *IMS Health*,<sup>118</sup> and

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<sup>114</sup> Ibid, para. 53-54.

<sup>115</sup> J Brand 'Intellectual Property and the abuse of dominant position in South African Competition law' (2005) 122(4) *SALJ* 907-928.

<sup>116</sup> [1988] ECR 6211: Refusal to grant license to original automobile spare parts incorporating design rights to the parts.

<sup>117</sup> [1995] ECR I-743: restricted access to TV listings needed for comprehensive TV guide.

<sup>118</sup> Case C-418/01 (29 April 2004): restricted access to Brick Structure containing vital information needed for providing information services to pharmaceutical companies.

*Microsoft v Commission*.<sup>119</sup> The facts of these cases have been extensively discussed elsewhere.<sup>120</sup> However, the effect of the cases is that mere ownership of copyright does not amount to market dominance. As such, refusal to license by the copyright owner cannot be regarded as abuse of dominant position, except in exceptional circumstances. A situation will be regarded as an exceptional circumstance where a copyright owner, shown to occupy a dominant position in a given market, has refused to license; the refusal to license relates to a product or service which is inevitable to the exercise of a particular activity on a given market or related market; the refusal to license excludes any effective competition in that given market or related market in favour of the copyright owner; the refusal to license prevents the appearance of new products for which there is a potential consumer demand; and the refusal to license is not objectively justifiable.

The two South African cases (*Hazel Tau v Glaxo and Boehringer* and *Glaxo Wellcome (Pty) Ltd v NAPW*) considered above, especially the *Hazel Tau* case, are very important in that they demonstrate the usefulness or otherwise of competition law to control excessive pricing by a dominant firm in a given market. Within competition law scholarship, two opposing schools of thought have emerged on the question whether competition law should intervene in situations of excessive prices.

There is the non-interventionist school, which holds the view that questions of excessive pricing should be determined by market forces and not be the pre-occupation of competition law. The rationale for this position is that excessive prices are short term in nature and not long term. The argument is that the endurance is constrained by entrance of new firms offering attractive prices to customers with the effect that a dominant firm can only derive benefit from its excessive pricing in a fleeting period of time. The overall effect is that excessive pricing will itself promote competition, which will eventually reduce prices, in the given market. Thus, except a particular market is protected by high entry barriers, excessive prices are ordinarily self-correcting.<sup>121</sup>

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<sup>119</sup> Case T-201/04 (17 September 2007): access to interoperability information contained in Windows operating system)

<sup>120</sup> Brand op cit note 115; van der Merwe op cit note 8.

<sup>121</sup> A Fletcher and A Jardine 'Towards an Appropriate Policy for Excessive Pricing' in CD Ehlermann and M Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (2008) 533; M Motta and A de Streel 'Exploitative and Exclusionary Excessive Prices in EU Law' in CD Ehlermann and I Atanasiu (ed), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (2006) 91.

Also, the non-interventionists argue that although ‘cost-price comparison’<sup>122</sup> is possible in the resolution of excessive pricing disputes, some practical barriers exist in the way of competition law enforcers’ successful determination of the excessiveness of the price of a dominant undertaking. The barriers include, among others, the fact that audited financial statistics regularly reported by the firms in a market are not made for the purpose of applying competition law and cannot be relied upon by competition law enforcers in the sense that they hardly reveal the economic costs by addressing capitalisation of market research and development, inflation and do not properly adjust the rate of return for risk, among others, in the given market.<sup>123</sup>

Finally, the non-interventionist school believes that price regulation through competition law is not the best way to solve the excessive pricing problem since fines for excessive pricing, which is the tool deployed by competition law in this regard, does not displace the problem permanently. This is so because market conditions change regularly and dominant firms are inclined to adjust their prices accordingly, thus imposing the burden of regular monitoring of prices by competition law enforcers who possibly lack knowledge of the market dynamics of sector-specific industries. In view of the foregoing, the non-interventionist scholars believe that sector-specific regulators are best equipped to regulate prices in specific industries.<sup>124</sup> In support of their position, the non-interventionist scholars often cite the fact that the US competition law does not concern itself with excessive pricing issues.<sup>125</sup>

On the other hand, the interventionist scholars contend that excessive pricing issues should form part of the focus of competition law and enforcement. Citing EU competition jurisprudence, the interventionist school believes that there is a good match between the law against excessive pricing and competition policy, which

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<sup>122</sup> L Hou ‘op cit note 98.

<sup>123</sup> *Scandlines Sverige AB v Port of Helsingborg* Unreported EU Commission, Case COMP/A.36.568/D3 (23 July 2014) available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/36568/36568\\_44\\_4.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/36568/36568_44_4.pdf), accessed 4 March 2019; DS Evans and AJ Padilla ‘Excessive Prices: Using Economics to Define Administrable Legal Rules’ (2005) 1 *Journal of Competition Law and Economics* 97; D Geradin ‘The Necessary Limits to the Control of ‘Excessive’ Prices by Competition Authorities—A View from Europe’ (2007) *Tilburg University Legal Studies Working Paper* available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022678](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022678), accessed 4 March 2019.

<sup>124</sup> M Motta and A de Streel ‘Excessive Pricing in Competition Law: Never Say Never?’ in Swedish Competition Authority (ed) *The Pros and Cons of High Prices* (2007) 14; E Paulis ‘Article 82 and Exploitative Conduct’ in CD Ehlermann and I Atanasiu (ed) *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (2006) 515.

<sup>125</sup> For instance, see *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko, LLP* 157 L Ed 2d 823 (2004); *Berkey Photo, Inc. v Eastman Kodak Co.* 603 F 2d 263, 294 (2nd Cir 1979).

ultimately is the promotion of consumer welfare. Thus, these scholars hold the view that since excessive prices are harmful to consumer welfare, there is need to resort to competition law for consumer protection against excessive pricing.<sup>126</sup>

Also, contrary to the non-interventionist scholars' argument that excessive pricing attracts competition, the interventionist proponents believe that it is efficiency, and not excessive pricing, that promotes competition in a market.<sup>127</sup> According to Hou, the argument is that if 'potential competitors were aware that dominant undertakings would decrease prices after their entry, they may not enter that market even if the current prices were high. Potential competitors would enter the market only when they knew that they were more efficient than the dominant undertaking.'<sup>128</sup> Moreover, as manifested in most network markets, such as telecommunication and electronic communication markets, possible new entrants would be prevented from entering a market with high entry barriers whether or not prices are excessive.<sup>129</sup>

Furthermore, the interventionist scholars are of the view that the problems associated with excessive pricing assessment cannot be so exaggerated because even though circumstances exist wherein the distinction between excessive and legal prices is not so clear, there are nonetheless situations where the excessiveness of a price can be shown with ease.<sup>130</sup> Finally, the interventionist school concurs that excessive pricing regulation through fines may be unpleasant and onerous for competition law enforcers. Yet, they believe that there are other channels and remedies within competition legal framework through which excessive prices can be dealt with. For instance, consumers can be encouraged to resort to less prices being offered by new entrants. For this purpose, competition law will have to focus on removing other strategic and structural barriers by regulating the conducts of the dominant firm constituting such barriers.<sup>131</sup>

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<sup>126</sup> P Akman 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29(2) *Oxford Journal of Legal Studies* 267-303; Fletcher and Jardin op cit note 121.

<sup>127</sup> A Ezrachi and D Gilo 'Are Excessive Prices Really Self-Correcting?' (2009) 5 *Journal of Competition Law and Economics* 249.

<sup>128</sup> Hou op cit note 98.

<sup>129</sup> M Motta and A de Streel op cit note 124.

<sup>130</sup> Fletcher and Jardin op cit note 121.

<sup>131</sup> EU Commission 'Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (2009/C 45/02) Official Journal of the European Union available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN), accessed 4 March 2019.



The aim of the foregoing review is not to take side with the non-interventionist or interventionist school. Indeed, while the interventionist school has not succeeded in displacing the non-interventionist school, both schools meet themselves at some point. For instance, both schools recognise that excessive prices would endure in a market with high entry barriers. Also, the interventionist school does not shy away from the challenges of competition law intervention in excessive pricing situation but believes in the existence of cases where such intervention would not be problematic. The goal of this review is to acknowledge the difficulty inherent in resorting to competition law to regulate excessive prices, especially in sector-specific industry just as manifested in the *Hazel Tau* case above. Further, from a competition law perspective, the issue of excessive pricing is not clear cut especially in very peculiar markets, such as the collective management and licensing markets dealing with goods of a special nature (copyright). The review also highlights the challenges of competition law intervention in sector-specific industries, such as the copyright industry. The challenges include the fact that competition law enforcers may not be well equipped to deal with sector-specific issues and the fact that important factors to be considered when determining excessive pricing issues may not often be available to competition law enforces. However, where competition concerns, such as excessive pricing, are often raised in sector-specific industries (as is the case with the collective management and licensing markets as shown from the discussion at 5.3 below), it is important for sector-specific regulators to be empowered to address the competition concerns.

### 5.2.3.3 *Merger Control*

Merger control is one of the major aims of competition law. Mergers may take the form of several firms combining to form a single entity; or a firm taking control of another firm by acquiring the assets of that firm.<sup>132</sup> Merger control provisions are contained in chapter three of the SA Competition Act and Part XII of the Nigerian Competition Act.

Copyright issues may not ordinarily be at the core of merger control proceedings when considering questions of concentration. But acquisition of copyright

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<sup>132</sup> J Modrall 'Big Data and Merger Control in the EU' (2018) 9(9) *Journal of European Competition Law and Practice* 569-578; A Jones and J Davies 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) *European Competition Journal* 453-497.

may lead to concentration if the copyright forms the whole or part of a firm's undertaking. Such acquisition is usually executed in the form of exclusive licenses over the copyright. The exclusive license would lead to control of the licensor's business if the copyright forms the 'foundation of the existing market position of the licensor in the relevant market'.<sup>133</sup> From a copyright perspective, the major concern of competition law is whether the merger leads to concentration in the market. If it does, competition law will further be concerned about whether the concentration results in market entry barriers (does it prevent access of copyright works to the market and access of users to copyright works?); and whether it negatively affects creativity, dynamic efficiency and consumer welfare.

A few South African cases may help to shed some light on the copyright-merger related discourse, even though they do not relate directly to the acquisition of copyright. *Pioneer Hi-Bred International v Competition Commission* manifests innovation (creativity) and dynamic efficiency considerations in merger control proceedings under the SA Competition Act.<sup>134</sup> This case involved a proposed merger in the South African hybrid maize seed breeding market between the first and second appellants under ss12A and 14 of the SA Competition Act.

Section 12 requires the SA Competition Commission and SA Competition Tribunal, in merger proceedings, to first consider whether the merger is likely to substantially prevent or lessen competition in a given market. In doing so, they are to consider the possibility of the merger to cause market entry barriers; dynamic characteristics of the market; and whether the merger will lead to removal of an effective competitor in the market; among others. In cases where the merger will lessen competition, they are required to further determine if the merger will result in any technological, efficiency or other procompetitive gains likely to offset the anti-competitive effects; and whether it can be justified on substantial public interest grounds. Section 14 deals with procedural matters concerning intermediate mergers.<sup>135</sup>

The second appellant had developed a unique germplasm needed in the market. However, its competitive force in the market was declining. To remain in the market, it needed to gain access to the first appellant's breeding technology which was compatible with its germplasm. The proposed merger would allow the second appellant

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<sup>133</sup> Drexl op cit note 9 at 187-189.

<sup>134</sup> Supra note 45.

<sup>135</sup> See Competition Act, s11(1)(a) and (5)(b) for the meaning of intermediate merger.

access to the first appellant's technology and prevent the impending exit of the second appellant from the market. The second respondent intervened in the application for approval of the merger and objected because the merger would have the effect of a maize seed price increase to the detriment of local farmers since the number of competitors in the market would shrink if the merger were to be allowed. For this purpose, the SA Competition Commission was willing to approve a merger between the second appellant and any of two identified international maize seed developing firms since this would increase the number of competitors in the market. However, it disapproved the merger in issue because it would lead to fundamental market entry barriers and lessen competition in the market. The SA Competition Tribunal confirmed the SA Competition Commission's ruling, hence the appeal.

In its judgment, the SA Competition Appeal Court found that the two identified international maize seed breeders' technologies were not compatible with the second appellant's germplasm whereas the first appellant's was. Further, the SA Competition Appeal Court found that, contrary to the legislative intention behind s12 of the SA Competition Act, refusing the merger of both appellants would lead to the weakening and eventual demise of the second appellant which is an important player in the market.<sup>136</sup> Most importantly, the SA Competition Appeal Court found that, if allowed, the merger would have the propensity to promote innovation in the maize seed breeding business because of the unique and promising germplasm of the second appellant which could only be effectively commercialised if merged with a bigger player, such as the first appellant. Moreover, the long-term effect of the merger would be dynamic efficiency and consumer welfare as it would bring about improved maize seed hybrids.<sup>137</sup> Finally, the SA Competition Appeal Court held that the proposed merger would not lessen competition in the market and that the merger would give birth to a stronger competitor compared to other players in the market.<sup>138</sup>

*Nestle SA v Infant Nutrition Business of Pfizer Inc.* is a merger which included the transfer of trademark of the product covered by the merger.<sup>139</sup> The parent body of Nestle SA (Nestle) had acquired the global instant baby nutrition business of Pfizer at

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<sup>136</sup> Ibid, para. 30.

<sup>137</sup> Ibid, para. 50.

<sup>138</sup> Ibid, para. 87. Note that the order of cost against the Competition Commission in this case was overturned on appeal by the Constitutional court in *CompCom SA v Pioneer Hi-Bred International* [2013] ZACC 50.

<sup>139</sup> [2013] ZACT 16.

a public auction resulting in the merger. Through local subsidiaries, Nestle had merged with Pfizer's IBN business in different countries and had been subjecting the mergers to merger control procedures in different countries, including South Africa. The goal of the mergers was for Nestle to register its footprints in China and other Asian markets where Pfizer instant baby nutrition formula is largely consumed. The South African merger, like that in other countries, included a transitional re-branding remedy by which all stakes of Pfizer in the instant baby nutrition business, including the trademark and trade secret, would be sold to a third party. Under the initial transitional re-branding remedy, the third party would be allowed to use Pfizer's trademark for a five-year period within which the third party would be expected to have developed its own brand name. Afterwards, there would be another five-year black-out period wherein the Pfizer trademark will not be used. However, the third party would have access to Pfizer's process technology relating to the instant baby nutrition business. After the black-out period, Pfizer trademark would then be licensed unencumbered to Nestle.

The alternative to the transitional re-branding remedy is a permanent divestiture of Pfizer's trademark to the third party without the re-branding obligation. This would amount to a license in perpetuity coupled with the third party's royalty payments obligation with a further risk that Nestle might weaken the third parties position in the market by manipulating the licensing agreement.<sup>140</sup> Such alternative would also lead to split ownership of the trademark or dual branding between the third party and Nestle since Nestle had already taken over Pfizer's instant baby nutrition business in other countries. The ultimate effect of this would be free riding on the trademark by the third party and Nestle.<sup>141</sup>

Although it accepted the transitional re-branding remedy as a better alternative to take care of the above risk, the SA Competition Tribunal rejected the 10year proposed time frame because of the competition issues raised by the merger. That is, whether the merger would lead to market concentration and increase market share in Nestle's favour and lessen competition in the relevant market in the long run. Thus, the transitional re-branding remedy was amended to include an initial ten-year period for usage of Pfizer trademark by the third party and 10year black-out period, making 20 years in all. This 20year time-frame was accepted by the SA Competition Tribunal

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<sup>140</sup> Ibid, para. 37.

<sup>141</sup> Ibid, para. 38-43.

because it would be long enough to allow the third party to develop its own trademark since during the black-out period, the consumer public will not be exposed to Pfizer's trademark; and the third party would have the benefit of using Pfizer's process technology during the period and emerge as a 'viable, stand-alone competitor, independent of Nestle and without any association or link to the Pfizer brands in the long run'.<sup>142</sup> Thus, the case may be seen as an example of when competition law will allow market power obtained from the acquisition of IPRs where it ensures market entry and promotes innovation.

Finally, the SA Competition Tribunal's opinion in *Competition Commission v Edgars Consolidated Stores Ltd* seems to suggest that copyright forming part of the book debt of a firm acquired by another firm could, in deserving circumstances, be regarded as constituting part of the acquired business for purposes of merger notification under s12 of the SA Competition Act. Such circumstances would be when the copyright enables the acquiring firm to increase its market share and enhance its competitive position in a given market.<sup>143</sup>

### 5.3 Competition law and CMOs

As already now over-flogged, particularly in 2.4.3 above, competition courts adopt the approach of recognising CMOs' in the copyright management and licensing markets, while applying competition rules to prevent them from abusing their monopoly in their relationship with copyright owners; users; and among themselves. In pursuit of this objective, competition law seeks to address specific competition concerns, such as (a) abuse of market dominance, (b) excessive pricing (royalties), (c) refusal to license, (d) refusal to accept copyright owners as members, (e) discrimination between copyright owners and (f) discrimination between users, among others in the copyright markets. To this end, CMOs are scrutinised under the rules against restrictive agreements, abuse of market dominance and merger control. On the other hand, copyright-sector specific regulation adopts a subjective approach to protect the interest of copyright owners and users from the conduct of CMOs within the copyright system by subjecting CMOs to defined modes of operation.<sup>144</sup>

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<sup>142</sup> Ibid, para. 44-45.

<sup>143</sup> [2003] ZACT 19, para. 68.

<sup>144</sup> JM Fujitani 'Controlling the market powers of performing rights societies: an administrative substitute for antitrust regulation' (1984) 27 *Cal LR* 103-137.

It is important to note that, like individual copyright owners, CMOs are subject to copyright law's internal mechanisms limiting copyright exclusivity. In other words, CMOs are ideally restrained, for instance, by copyright exceptions and limitations in their relationship with copyright users. However, the impact of these exceptions and limitations on CMOs' monopoly in collective management is a different matter entirely. As is apparent from discussions in chapter two, CMOs' use of blanket licenses is more widespread than transactional licenses. Because of the difficulty of definition, it appears users of copyright works are hardly interested in going into the niceties of, or indulging in the task of defining, copyright exceptions and limitations during negotiations for blanket licenses. This is worsened by the fact that blanket licensing agreements usually originate from CMOs with the effect that the terms therein tend to be favourable to the copyright owners represented by the CMOs. To play safe, users are mostly interested in securing blanket licenses with broad indemnity against any copyright infringement claims.<sup>145</sup>

The foregoing forms the reason for legislators in Nigeria and South Africa to craft specific regulations within the copyright regimes of both countries to govern CMOs. However, to be effective from a competition law perspectives, such copyright sector-specific regulation regimes should incorporate competition rules that address CMOs competition concerns. The rest part of this chapter examines the specific CMOs' competition concerns, discusses the relevant competition rules that have been developed overtime to address CMOs' competition concerns, and determines whether the Nigerian and South Africa copyright regulatory frameworks contain rules that can be deployed to address CMOs' competition concerns.

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<sup>145</sup> Generally, see ARL *Minutes of the 21st Meeting* (1993) 16; ARL et al 'Code of best practices in fair use for academic and research libraries' (2012) available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>, accessed 4 April 2018; P Adler et al 'Fair use challenges in academic and research libraries' (2010) *Association of Research Libraries* available at [http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pjip\\_copyright](http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pjip_copyright), accessed 4 April 2018; DE Alford 'Negotiating and analyzing electronic license agreements' (2002) 94(4) *LLJ* 621-644; ACE 'Use of copyrighted music on college and university campuses' (2013) available at <http://www.acenet.edu/news-room/Documents/Music-use-of-copyright.pdf>, accessed 4 April 2018.

### 5.3.1 Corporate status of CMOs

The prescription of the corporate structures for CMOs is one way of ensuring efficiency, transparency and accountability. While CMOs' are generally non-profit companies, it is possible to find CMOs established as for-profit companies, or partnerships, among others. Related to their corporate structure is the issue of CMOs' internal management. On the face of it, competition law appears not well suited to handle issues of the corporate structure of CMOs, which is a matter for corporate law. As noted elsewhere, competition law and corporate governance generally focus on unrelated and exclusive considerations.<sup>146</sup> Corporate law primarily relates to the internal affairs of a company and the company as agency to achieve defined business objectives. On the other hand, competition law, as is apparent from the discussion so far, is concerned with the promotion of competition, among others, in a given market.<sup>147</sup> The focus of competition law is primarily on corporate entities interactions in a defined market. However, according to Lim and Min, corporate law and competition law are not completely exclusive. The authors contend that corporate entities act 'within the boundaries' of a defined market, 'and the market environment informs the structure and behaviour' of the corporate entity.<sup>148</sup>

Thus, within the context of collective management, competition law may step in where, for instance, merger issues are raised with regards to formation of a CMOs.<sup>149</sup> Here, the concern of competition law would be to ensure, through merger control rules and rules against restrictive agreements, that competition is not weakened in the given market. Although, merger control rules have seldom, if at all, been applied to CMOs, the rules may bear some relevance since CMOs may be considered as joint ventures of copyright owners. Joint ventures constitute one of several forms of concentration.<sup>150</sup> This is so especially when the formation of the CMOs involves some form of combination or acquisition of control. Even so, merger control decisions on CMOs 'may [...] take account of the existence of [copyright] sector-specific regulation' that

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<sup>146</sup> G Lim and Y Min 'Competition and Corporate Governance: Teaming Up to Police Tunneling' (2016) 36(2) *Northwestern Journal of International Law & Business* 267-301.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> SW Waller 'Corporate governance and competition policy' (2011) 18(4) *George Mason Law Review* 833-887.

<sup>150</sup> EN Reddick 'Joint Ventures and Other Competitor Collaborations as Single Entity "Undertakings" Under US Law' (2012) 8(2) *European Competition Journal* 333-363.

requires CMOs to open their membership to all copyright owners of works falling within their repertoires.<sup>151</sup>

As gleaned from chapter three, the provisions of the Nigerian Copyright Act, CMO Regulations and CAMA provides for the corporate structure and internal affairs of CMOs in Nigeria.<sup>152</sup> The provisions are geared towards ensuring accountability, transparency and efficiency in the affairs of CMOs in Nigeria.

For South Africa, it was observed in chapter four that the SA Copyright Act, Performers Protection Act, CS Regulations and the Companies Act are silent on CMOs corporate structure. And that while most of the CMOs are non-profit companies, DALRO for instance is a private company. Nonetheless, an organisation intending to operate as CMO, regardless of the structure chosen, must comply with the provision of the Companies Act related to formation of companies.<sup>153</sup> Further, it was observed that the accountability provisions in the CS Regulations only apply to needletime CMOs.<sup>154</sup> However, by virtue of their formation as non-profit companies and private companies, all CMOs are subject to the Companies Act's provisions relating to internal management,<sup>155</sup> and are to be guided by the corporate governance codes in the King IV Report.

Finally, based on the discussions in chapters three and four, to ensure that copyright owners form part of the decision-making process in their respective CMOs, the Nigerian Copyright Act and CMO Regulations in Nigeria, as well as the CS Regulations and Companies Act in South Africa, entitles each member of a CMO to one vote during general meetings. The regulatory frameworks also ensure that the governing boards/boards of directors of CMOs are selected from the members.<sup>156</sup>

### **5.3.2 Relationship between CMOs and copyright owners**

The relationship between CMOs and copyright owners is one area where CMOs' competition concerns usually arise. Hence, competition law has often been applied to regulate this relationship. Indeed, the CRM Directive shaped by over four decades

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<sup>151</sup> Drexl op cit note 9 at 231.

<sup>152</sup> Nigerian Copyright Act, s39(2); CMO Regulation, reg1, 5, 7, 8, 9; CAMA, ss26(1), 211-243, 370, 373-378

<sup>153</sup> Companies Act, ss8, 10, Chapter 2 (parts A and B), and Schedule 1.

<sup>154</sup> Regulation 4.

<sup>155</sup> Companies Act, ss28, 30, 33, Chapter 2, part f, Schedule 1 para 2 and 5.

<sup>156</sup> CMO Regulations, reg5; CS Regulations, reg5; Companies Act, s1, 8(2), ss57-65, Schedule 1 para 1.



competition jurisprudence developed by the CJEU, obligates EU member states to ensure that CMOs act in the best interests of the copyright owners and that CMOs do not impose on copyright owners any obligations, which are not objectively necessary for the protection of, and the effective management of copyright.<sup>157</sup> In this regard, competition law has framed rules relating to CMOs' duty to accept copyright owners within the category of works forming their repertoire; restriction of copyright owner's ability to withdraw from collective management; and CMOs power to demand exclusive licenses from copyright owners.

#### 5.3.2.1 *CMOs duty to accept members*

From an economic perspective, CMOs would not have any real motivation to refuse a copyright owner within the category of works forming their repertoire because higher numbers of members create economics of scale in their favour. However, CMOs may reject copyright owners whose works are considered as economically less viable, the management of which will lead to higher costs over benefits. Also, CMOs may want to specialise in a specific *genre* of a work (for instance academic literature) and copyright owners of works outside such genre would be rejected. Further, CMOs would ordinarily reject foreign copyright owners because of limitations in this regard contained in reciprocal agreements.

From a competition law perspective, the Max Planck Report found law and practice, especially from the CJEU, to the effect that a refusal of CMOs to accept any copyright owner of the class forming their repertoire as member constitutes abuse of dominance by the CMO.<sup>158</sup> This rule is now codified in the CRM Directive, which places a duty on CMOs to accept and manage copyright for the copyright owners falling within the scope of the activities of the CMOs, unless has objectively justified reasons to refuse management of the copyright. The CRM Directives also requires that CMOs membership conditions are based on objective, transparent and non- discriminatory criteria.<sup>159</sup>

As highlighted in chapter three above, the CMO Regulations in Nigeria places a duty on CMOs to accept all copyright owners of works within the category for which the CMOs are applying for approval. Such membership may be either directly or

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<sup>157</sup> CRM Directive, art.4

<sup>158</sup> Drexl op cit note 9 at 234.

<sup>159</sup> CRM Directive, arts. 5(2) and 6(2).

through copyright owners' association.<sup>160</sup> Similarly, as found in chapter four, the CS Regulations mandate needletime CMOs in South Africa to open their membership to all copyright owners falling within the category of works forming their repertoire. Such membership may be direct or indirect, through a copyright owners' association.<sup>161</sup> While the CS Regulations only apply to needletime CMOs, non-needletime CMOs in South Africa, by virtue of their being either non-profit companies or private companies, are subject to the Companies Act which, unlike the CS Regulations, does not confer an express duty on CMOs to accept copyright owners. In terms of the Companies Act, CMOs that are non-profit companies are generally not required to have members, except their Memorandum of Incorporation (MOI) provides otherwise. However, where their MOI requires them to have members, membership shall not be restricted or regulated in such a way as to amount to unfair discrimination on grounds of sex, ethnic or social origin, colour, sexual orientation, religion, among others. Indeed, all the members must be treated equally in terms of rights administration.<sup>162</sup> It is doubtful whether this provision can be interpreted in terms of competition law as a specific duty on CMOs that are non-profit companies to accept all copyright owners within the category of works forming their repertoire. Nor whether it can be interpreted to preclude CMOs from rejecting copyright owners of economically less viable works. What is certain is that the provision was made to further the constitutional right to equality in s9 of the South African Constitution and it applies to all non-profit companies (CMOs or not). An express duty as contained in the CS Regulations would have sufficed. On the other hand, apart from requiring private company CMOs to have a minimum of one shareholder, there is no express duty on them to open their membership to all copyright owners within the category of works forming their repertoire.<sup>163</sup> At best, their practice of opening membership to all such copyright owners is informed by the economic consideration stated above.

Further, under the EU framework, the rule placing a duty on CMOs to accept copyright owners also extends to foreign copyright owners.<sup>164</sup> From a country-specific perspective, this rule should be looked at carefully especially since reciprocal agreements between sister foreign CMOs are meant to take care of foreign copyright

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<sup>160</sup> Reg4.

<sup>161</sup> Reg5.

<sup>162</sup> Companies Act, Schedule 1 para 4.

<sup>163</sup> Companies Act, ss57-65.

<sup>164</sup> CRM Directive, art.5(2).

owners. Reciprocal agreements align with the principles of territoriality and national treatment in copyright law. They allow foreign copyright owners to enjoy similar protection afforded to local copyright owners, in terms of monitoring and rights enforcement, by local CMOs within the bounds of the host country's copyright law. However, the rule relating to foreign copyright owners was hinged on the basis that reciprocal agreements will subject foreign copyright owners to more administrative cost since the local and foreign CMOs who are parties to the reciprocal agreement will both take out different percentages as administrative costs from the royalties collected on behalf of the foreign copyright owners. Even so, as gleaned from the Max Planck Report, the rule emanated from the CJEU and it applies to nationals of EU member states and the European Economic Area (EEA),<sup>165</sup> which may be regarded for purpose of this discussion as a single jurisdiction because of the way EU competition law under the TFEU is applied. That being so, it is submitted that refusal to accept a foreign copyright owner by a CMO in Nigeria and South Africa would not be interpreted under the SA Competition Act and Nigerian Copyright Act as abuse of dominance position. In effect, the duty placed on Nigerian and South African CMOs to accept copyright owners under their respective copyright sector-specific regulation cannot be interpreted to extend to foreign copyright owners.

#### **5.3.2.2 *Restriction on copyright owner's exclusive rights***

Restrictions on copyright owners' exclusive rights by CMOs may manifest in three ways. First, CMOs may require copyright owners to assign their copyright in both current and future works for the whole world and for all uses. Secondly, CMOs may restrict copyright owners' ability to withdraw their copyright and confer it on another CMO. Finally, CMOs may claim exclusive licenses from copyright owners such that the copyright owners cannot grant direct licenses.

From a competition law perspective, these restrictions have been considered based on the rules against abuse of dominance on a case by case basis. Although the competition courts did not clearly resolve the legality or otherwise of the restrictions, they direct that the restrictions should be 'determined in the light of their individual and combined effect'. In this regard, a 'two-step approach' is adopted: that is, the definition of the 'objectives that justify restrictions on the economic freedom of

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<sup>165</sup> Drexler op cit note 9 at 234-235.

[copyright owners] against powerful exploiters and distributors of their works'; and a 'proportionality test' by which CMOs may only 'impose restrictions on [copyright owners] that are absolutely necessary for the enjoyment of a position required for the [CMO] to carry out its objectives'.<sup>166</sup>

Regarding the restrictions identified above, the Max Planck Report found competition case law to the effect that CMOs would be abusing their dominance if they required copyright owners to transfer their copyright for the whole world and for all uses. This is because such requirement would restrict copyright owners from mandating other CMOs to administer some of their rights or issuing licenses directly to users. But CMOs would not be abusing their dominance if they required transfer of current and future works because this will allow a CMO to 'build up attractive repertoires [...] that they may then license for mass use in particular. The creation of larger repertoires also serves the interest of [copyright owners] who will benefit from the increased economic value of this repertoire'.<sup>167</sup>

Competition law also prohibits CMOs from requiring copyright owners to grant them exclusive licenses for the purpose of collective management.<sup>168</sup> The case law regards such terms as restrictive. The rationale for this is that the terms will prevent copyright owners from contracting individually with users. From a competition law perspective, the question should be whether such term is necessary for effective collective management.<sup>169</sup> Thus, CMOs 'should be allowed to claim exclusivity by excluding the transfer of the same rights to any other [CMO]. At the same time [copyright owners] should be allowed to grant a licence for use to any other person'.<sup>170</sup>

Further, from a competition law perspective, restrictions on copyright owners' ability to terminate and withdraw their relationship with CMOs constitutes an abuse of dominance by CMOs. Such restrictions included clauses requiring transfer of copyright to CMOs for a mandatory period of three and six years, and allowing CMOs to continue managing a right for an extended period of five years after the copyright owner has withdrawn membership. This rule is enshrined in the CRM Directive, which empowers copyright owners to terminate or withdraw their mandates given to CMOs. Upon serving reasonable notice, not exceeding 6 months, to the CMOs. However, the CMOs

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<sup>166</sup> Ibid at 239.

<sup>167</sup> Ibid at 239-240.

<sup>168</sup> CRM Directive art. 5(2) and (3).

<sup>169</sup> Drexl op cit note 9 at 244-245.

<sup>170</sup> Ibid at 245.

may decide that such termination or withdrawal would be effective at the end of the financial year. Nonetheless, the CMOs cannot restrict the power of copyright owners to terminate or withdraw by requiring the copyright owners to transfer the mandate to another CMO.<sup>171</sup>

Based on the discussion in chapter three, the Nigerian Copyright Act and CMO Regulations allow copyright owners in Nigeria to transfer their copyright in existing or future works. However, CMOs are prohibited from requiring copyright owners to appoint them sole collecting agents. In other words, CMOs cannot require exclusive license of all rights in a work by copyright owners as a compulsory requirement for membership. However, in terms of section 11 of the Nigerian Copyright Act, a copyright owner may elect to transfer his/her copyright to a CMO through assignment or exclusive license. As stated in 3.5.1.2 above, in the absence of any clear limitation on the assignment or exclusive license, the legal implication is that the CMO can administer all the bundle of rights contained in the work in question. The same cannot be said for situations where the assignment or exclusive license expressly limits the CMO to certain rights in the bundle of copyright. Nonetheless, as pointed out in chapter three, the issue of what specific rights are subject to collective management, especially where the assignment or license does not contain any express limitation, is still being debated in Nigeria. This is so because of the practice in the music industry where artists assume that in assigning their rights to CMOs they are merely giving away that right that is best suited for collective management.<sup>172</sup> That being said, CMOs are also prohibited from requiring copyright owners to make them agents for any other purposes outside collective management. The prohibition extends to mandatorily requiring copyright owners to assign to them the right to collect royalties from equivalent foreign CMOs. A copyright owner has the right to withdraw his membership from, or the copyrights assigned to, the CMO. But reasonable notice of the intention to withdraw

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<sup>171</sup> CRM Directive, art. 5(4), (5) and (6).

<sup>172</sup> A Adewopo 'Developments in Collective Administration of Copyright, Licensing and Tariff Setting under Nigerian Copyright Law and Regulation' in DCJ Dakas et al (eds.) *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (2016) 677-700; J Onyido, et al 'Who is a proper plaintiff in an action for the enforcement of copyright in Nigeria: a review of the Nigerian Court of Appeal in Musical Copyright Society Nig. Ltd v Nigerian Copyright Commission' (2017) 4 available at <http://www.spaajibade.com/resources/wp-content/uploads/2017/01/Proper-Plaintiff-in-an-Action-for-the-Enforcement-of-Copyrights-in-Nigeria-Review-of-the-decision-in-Musical-Copyright-Society-of-Nigeria-Ltd-v.-Nigeria-Copyright-Commission.pdf>, accessed on 3 May 2017.

membership must be given to the CMOs. The question of reasonable notice is left for the CMO and the copyright owner to determine by contract.<sup>173</sup>

Generally, the SA Copyright Act empowers copyright owners in South Africa to transfer their copyright in existing and further works.<sup>174</sup> However, from the discussion in chapter four, the CS Regulations is not express on copyright owners' ability to withdraw their needletime rights from needletime CMOs. It confers on them the rights and remedies under, among others, any applicable legislation governing such CMOs.<sup>175</sup> In effect, the provisions of the Companies Act applicable to CMOs that are non-profit companies (needletime or non-needletime) would be of relevance in this regard. The Companies Act mandates CMOs that are non-profit companies to stipulate in their MOI the grounds upon which membership may cease or be suspended. It also prohibits such CMOs from presuming the membership of any person; regarding any person as their member; or providing automatic membership of any person on any basis other than life-time membership awarded to a person for service to the CMO and with the consent of the person.<sup>176</sup> Obviously, such prohibitions cannot directly take care of specific competition law concern relating to withdrawal of membership from CMOs. Worse still, the Companies Act did not make provisions in this regard for private company CMOs. It appears this lacuna will be filled when/if the Copyright Amendment Bill is enacted. The Copyright Amendment Bill proposes a new s22C(1)(b), which seeks to empower copyright owners to withdraw authorisation granted to CMOs. Further, there is no express prohibition on CMOs capacity to require copyright owners to assign their copyright for the whole world and for specific uses. Neither are they restricted from requiring exclusive licenses from copyright owners. Unfortunately, the proposed s22C(1)(a) of the Copyright Amendment Bill seeks to achieve the opposite: if enacted, it will enable CMOs to require exclusive authorisation from copyright owners in South Africa. A somewhat indirect restriction can be found in the case of needletime CMOs since they are approved under the CS Regulations to manage needletime rights. Regulation 6(2) stated that such CMOs' aim shall be to 'administer public playing [needletime] rights [...]'.

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<sup>173</sup> Nigerian Copyright Act, s11; CMO Regulation, regs4 and 6.

<sup>174</sup> SA Copyright Act, s22.

<sup>175</sup> CS Regulations, reg5.

<sup>176</sup> Companies Act, Schedule 1 para 4(2).

### 5.3.3 Relationship between CMOs and users

As already now over-flogged, while competition among CMOs is highly possible in the copyright management market, this may not be so in the copyright licensing market because of the complementary nature of CMOs repertoires from the users' perspective. According to the Max Planck Report, the concern of competition law relating to the copyright licensing market is to protect users by ensuring that CMOs do not fix 'excessive royalty rates' or excessive prices. This is achieved through the rules against abuse of dominance. In this regard, competition law's application is 'mostly about exploitative and not exclusionary abuse'.<sup>177</sup> The debate about whether competition law should regulate excessive prices, and the implications of apply competition law to excessive pricing in industries subject to sector-specific regulations, have been highlighted above. the discussion that follows shows how competition law has intervened to regulate excessive prices (royalties) by CMOs and how the issue is addressed under the CMO regulatory frameworks in Nigeria and South Africa.

From competition law perspectives, there are three possible tests in determining excessiveness of royalty rates.<sup>178</sup> First is the cost-price margin test, according to which the cost of production and distribution of copyright works should be considered when deciding the excessiveness of a collecting society's royalty rates. However, applying this test will lead to difficulty especially given the nature of copyright management and licensing markets where other factors like consumer tastes and preferences play major roles. Secondly, there is the market-comparison test which seems more widely used especially by the CJEU and it appears more in sync with the realities of collective management. According to the test, the excessiveness of a CMO's royalty rates should be determined by comparing the rates charged by similar CMOs in countries with similar systems as the country in question and by comparing the royalty rates charged on different classes of uses by the collecting society in question. The third test is the reasonable-proportionality test, which relates to the question of whether flat royalty rates for blanket license may be regarded as abusive. According to this test, flat rates are accepted if they are necessary to protect copyright effectively while keeping the costs of collective management low.<sup>179</sup> Further, as found by the Max Planck Report,

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<sup>177</sup> Drexl op cit note 9 at 246.

<sup>178</sup> P Akman and L Garrod 'When are Excessive Prices Unfair? (2010) *CCP Working Paper 10-4* available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1578181](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578181), accessed on 4 March 2019.

<sup>179</sup> Ibid at 247-249.

the test has been applied to royalty rates differentials among users, for instance private and public broadcasters. The fixing of different royalty rates for different classes of users has been found not to be ordinarily illegal in terms of competition law insofar as such differential is objectively justifiable.<sup>180</sup> The differential would be illegal when it places one user in a competitively disadvantaged position as against another user especially where both users operate in a market.<sup>181</sup>

As found in chapter three, the CMO Regulations makes provision to prevent excessive royalty rates by Nigerian CMOs.<sup>182</sup> It empowers CMOs to fix royalty tariffs. In this regard, they are enjoined to take into consideration the monetary advantage obtained from the exploitation of the work by the user and the value of the work. Other factors to be considered are the purpose for which, and the context in which, the work is used; the manner or kind of use of the work; the proportion of the use of a work in the context of exploitation; any relevant decision of the Federal High Court or the Dispute Resolution Panel; among others. The CMO Regulations, however, prohibits CMOs from concluding the tariffs unilaterally. Thus, CMOs are prohibited from concluding royalty tariffs without subjecting it to negotiation between users individually or through user groups. Agreement reached from such negotiation must be notified to the NCC by the CMO. When agreement cannot be reached the parties are required to refer the matter to the NCC to constitute the Dispute Resolution Panel with the power to arbitrate or mediate over the royalty dispute. CMOs are also obligated to inform users of any planned change to agreed royalty tariff. The CMO Regulations also prohibits CMOs from granting different royalty rates to different users except the peculiar circumstance of a particular user justifies such differential in royalty rates.<sup>183</sup>

As gleaned from chapter four, the South African regulatory framework based on the SA Copyright Act, Performers Protection Act and CS Regulations requires royalty rates to be negotiated between CMOs (needletime and non-needletime) and copyright users.<sup>184</sup> Although not expressly stated with regards to non-needletime CMOs, the CS Regulations obligates needletime CMOs not to discriminate against users of the same class in terms of royalties. However, needletime CMOs may agree

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<sup>180</sup> *GEMA I*, decision 71/224/EEC of the European Commission of 2 June 1971. Generally, see CRM Directive, art.16.

<sup>181</sup> Drexler op cit note 9 at 249-261.

<sup>182</sup> Generally, see CMO Regulations, reg13.

<sup>183</sup> Ibid.

<sup>184</sup> SA Copyright Act, ss9A, 22 and Chapter 3; Performers Protection Act, ss5 and 13; CS Regulations, reg7.



upon different royalty rates with different classes of users. As further assurance against abuse of dominance by CMOs in fixing royalties, the regulatory framework requires CMOs and/or users to refer a matter to the Copyright Tribunal when they cannot reach an agreement on royalty tariffs.<sup>185</sup> Indeed, as is apparent from chapter four, there is some jurisprudential activity in this regard which aligns with the practice of the CJEU on determination of excessiveness of royalty. In this regard, the SCA has applied the market-comparison test and indicated unwillingness to apply the cost-price margin test as shown in *NAB v SAMpra* and *SAMpra v Foschini* examined in chapter four.

Finally, the rules against refusal to deal may be applied to CMOs where such CMOs refused to license with the objective of increasing their bargaining power against users or achieve some advantage to the detriment of competition in a given copyright market. An example may be where such license relates to an essential facility and refusal to license would enable the CMO to control the given market. However, as observed by the Max Planck Report, competition courts are hesitant to impose a duty to license on CMOs.<sup>186</sup> This may be because imposing such duty would weaken CMOs bargaining powers as dominant undertakings quite considerably and thereby reduce their capacity to effectively represent copyright owners. On the other hand, imposing such duty has the effect of ensuring access to copyright works – another important objective of CMOs. The CMO Regulations impose a duty to license on CMOs in Nigeria. It enjoins them to make their complete repertoire available to users on non-discriminatory terms.<sup>187</sup> Similarly, the SA Copyright Act also limits CMOs' capacity to refuse a licensing request in South Africa. It empowers the Copyright Tribunal to order compulsory license on reasonable terms including payment of royalties in cases where a CMO has refused or failed to grant a license.<sup>188</sup>

#### 5.3.4 Relationship among CMOs

Competition concerns relating to the relationship among CMOs arose around reciprocal agreements between cross-border sister CMOs.<sup>189</sup> Although, regarded as ordinarily not restrictive of competition because of the efficiency they create in collective management, reciprocal agreements were found to be capable of preventing

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<sup>185</sup> Ibid.

<sup>186</sup> Drexler op cit note 9 at 262-263.

<sup>187</sup> CMO Regulations, reg13.

<sup>188</sup> SA Copyright Act, chapter 3.

<sup>189</sup> Drexler op cit, note 9 at 263.

competition among CMOs from different countries in the copyright management market.<sup>190</sup> In the copyright licensing market, reciprocal agreements weaken competition by preventing CMOs from granting cross-border licenses.<sup>191</sup> Nonetheless, it is noted from the Max Planck Report, that the CJEU and EU have been active in considering competition concerns thrown up by reciprocal agreements.<sup>192</sup> The rationale for this is not far-fetched. The CJEU and European Commission are empowered to apply competition rules under the TFEU within the EU.<sup>193</sup> Pursuant to this, they have applied the competition rules to the reciprocal agreements between CMOs from EU and to the model reciprocal agreements framed by international organisations of CMOs, such as CISAC.<sup>194</sup>

In this regard, the adequacy of copyright-sector specific regulations in Nigeria and South Africa may not be called in question because, as confirmed by the SA Copyright Review Commission, national legislators cannot validly legislate over reciprocal agreements which are akin to bilateral or multi-lateral agreements between corporate entities.<sup>195</sup> As observed in chapter three, this may be why the Nigerian Copyright Act and CMO Regulations did not provide for reciprocal agreements in Nigeria. The CMO Regulations obligate CMOs to provide relevant information that will enable each of them perform their task. It also prevents them from doing anything that will prevent each other from carrying out its main objectives.<sup>196</sup> Regulation 6(3) of the CS Regulations (and the proposed s22C(3) of the Copyright Amendment Bill) which seeks to regulate reciprocal agreements in South Africa was criticised in chapter four on the strength of the CRC's position stated above. The Companies Act only provides some form of blanket regulation relating to mergers. Here, non-profit CMOs may not amalgamate or merge with a for-profit CMO. They may also not dispose of any part of their assets, undertaking or business to a for-profit CMO, except for fair value and to the extent that such disposition occurred in the ordinary course of the

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<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Generally, see *Greenwich Film v SACEM* [1979] ECR 2811; *Tournier* [1989] ECR 2521; *Lucazeau* [1989] ECR 2811.

<sup>193</sup> See Treaty on the Functioning of the European Union (2012/C326/01), art105; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU and 102 TFEU], arts4 and 31.

<sup>194</sup> Drexler op cit, note 9 at 263-264.

<sup>195</sup> DTI *Copyright Review Commission Report* (2011) 74.

<sup>196</sup> CMO Regulations, reg17.

CMOs' activities.<sup>197</sup> However, it is arguable that to the extent that reciprocal agreements may weaken or restrain competition in the respective copyright management and licensing markets in both countries, the agreements may come under judicial scrutiny locally. A reciprocal agreement may weaken competition in a given market, for instance, if it amounted to concerted efforts between the parties to the agreement and has the effect of limiting copyright owners' ability to become members of any CMO of their choice or of more than one CMO at the same time in Nigeria or South Africa, as the case may be.<sup>198</sup>

The foregoing finds support in the South African cases of *Pioneer Hi-Bred International v Competition Commission* and *Nestle SA v Infant Nutrition Business of Pfizer Inc.* examined in 5.2.3.3 above. Although the cases related to proposed merger between local firms and international firms through their local subsidiaries, the approach adopted by the SA Competition Appeal Court and the SA Competition Tribunal respectively are relevant here. Specifically, the *Pioneer Hi-Bred International* case involved the transfer of trademark as part of the proposed merger. In both cases, the courts were concerned about the effect of the proposed mergers on competition in the respective markets. The courts upheld the mergers because their implementation would promote competition in the markets. In effect, the mergers would have been rejected by the courts if their effect was to weaken or restrain competition in the respective markets.

## 5.4 Conclusion

Copyright and competition law, although adopting different methodologies, are complementary in the goal they seek to achieve. Both fields of law aim to enhance consumer welfare by ensuring continuity of creativity through the promotion of dynamic competition. Although copyright law confers some exclusive right on

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<sup>197</sup> Companies Act, Schedule 1 para 2(1).

<sup>198</sup> See Commission Decision COMP/C2/38.698 – CISAC of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. This decision was in respect of the CISAC model agreement devised to allow CISAC members to offer multi-repertoire licenses with multi-territorial effect. The European Commission ruled against the agreement because it raised vital competition law concerns, such as concerted actions on the part of the collecting societies concerned, and membership and territorial restrictions under Article 101 TFEU. However, the CJEU later upturned the ruling on the ground that the EC proved concerted practice on the part of the collecting societies. See *CISAC v European Commission* Case T-442/08 (decided 12 April 2013), para 182.

copyright owners, it limits these rights through some substantive and time-based limitations and exceptions. Even so, such exclusive rights are not regarded as conferring market power in terms of competition law. However, the copyright owners may exercise their exclusive rights in a manner that weakens or stultifies competition in a given market to their advantage. Thus, the exercise of copyright has been subjected to competition scrutiny under the rules against restrictive agreements, abuse of dominance and under merger control.

CMOs, as repositories of copyright works from several owners, are classic examples of market power conferred by copyright. In fact, they are generally monopolistic in nature. As such, they are subjected to different forms of regulations to ensure efficiency, transparency and accountability standards. In pursuit of these standards, competition law seeks to address specific competition concerns about CMOs, including abuse of market dominance, excessive royalties, refusal to accept copyright owners as members, discrimination between copyright owners, unreasonable restraint on copyright owner's exclusive rights, and discrimination between users, among others in the collective management and licensing markets. To address these concerns, some scholars believe that competition among CMOs for the same class of copyright should be promoted by regulation. Such regulations, according to the scholars, would displace CMOs' natural monopolies. Others are of the view that any overbroad regulation contributes to entrenching CMOs' natural monopolies. To these scholars, competition among CMOs should be facilitated, chiefly, by market forces with regulation playing a minimal oversight role. Still, some other scholars contend, and this thesis aligns with this view, that the efficiency, accountability and transparency objectives of regulating CMOs will best be achieved in collective management if regulation preserves CMOs' natural monopoly while creating room for some form of competition among copyright owners within the CMOs' fold. These scholars believe that this will effectively promote cultural creativity and dynamic competition, hence serving the collective goal of copyright and competition law. In essence, the efficiency, accountability and transparency objectives in regulating collective management will best be achieved if the regulatory framework preserves CMOs' natural monopoly while addressing the specific competition concerns

The application of competition law to CMOs developed along the third approach above. While recognising CMOs' market dominance, competition courts have subjected them to scrutiny under competition law through the rule of reason

approach, while addressing the specific competition concerns highlighted above. Essentially, the courts have engaged in balancing exercise by weighing CMOs' objects against the copyright owners' freedom to dispose of their works, the need for effective collective management and the need to foster competition in the copyright market. In this regard, competition courts have fashioned out rules to prevent CMOs from being anti-competitive. These rules are manifest in CMOs' relationship with copyright owners, users, and among themselves.

In this chapter, it was found, first, that competition law is not well suited to prescribe the corporate structure for CMOs. Rather, that is a matter for copyright-sector specific regulation. However, it was found that merger control rules may be relevant in this regard, especially as they relate to the formation of CMOs. Even so, merger decisions may even take account of the existence of copyright sector-specific regulation that requires CMOs to open their membership to all copyright owners of works falling within their repertoires. In summary, CMOs' corporate form and internal management are not competition concerns. They are within the realms of copyright-sector specific regulation and as apparent from the discussion in 5.3.1 above, they are provided for of by both the Nigerian and South African CMO regulation regimes.

Secondly, on the relationship between CMOs and copyright owners, competition rules relate to the duty of CMOs to accept all copyright owners of works forming their repertoire, failure of which may be regarded as abuse of dominance. Further, competition law rules prohibit CMOs from requiring copyright owners to grant them exclusive license to administer copyright for the whole world and for all uses; and placing unreasonable restriction on copyright owners' capacity to terminate or withdraw their mandates. As gleaned from the discussion in 5.3.2 above, whereas the Nigerian regulatory framework adequately addresses this concern, the South African regulatory framework does not. In particular, the Nigerian regime places a duty on CMOs in Nigeria to accept all copyright owners of works forming their repertoire. It also prohibits such CMOs from requiring exclusive licenses from copyright owners and empowers copyright owners to withdraw their mandates from CMOs subject to reasonable notice. On the other hand, the South African framework places an express duty only on needletime CMOs to accept all owners of needletime rights. There is no such duty on non-needletime CMOs. The framework does not expressly prohibit all CMOs in South Africa from requiring exclusive licenses from copyright owners, neither does it expressly empower copyright owners to withdraw their mandates from

CMOs. The proposed s22C(1) of the CAB does not completely address this gap. Although it will empower copyright owners to withdraw their mandate from CMOs, it will also enable CMOs to demand exclusive licenses from copyright owners. The better approach, from a competition law perspective, is to expressly prohibit CMOs from requiring exclusive authorisations from copyright owners.

Thirdly, competition law has been applied to control the royalty rates fixed by CMOs. The rules against excessive pricing were applied to control the fixing of excessive royalty rates by CMOs. Connected to this is the prohibition of the fixing of differential rates for different users except on justifiable grounds. Competition law rules relating to the ‘refusal to deal’ also have relevance in the area of refusal to license. However, competition courts have been hesitant to apply these rules to CMOs. Flowing from the discussion in 5.3.3, both the Nigerian and South African regulatory frameworks adequately address these competition concerns. Specifically, the Nigerian regulatory regime makes provision to prevent excessive royalty rates by Nigerian CMOs. It requires CMOs to fix and/or change royalty tariffs, subject to negotiations with users or user groups. The CMOs are also obligated to notify the NCC of any agreement reached based on such negotiations. In the event that no agreement is reached, the parties are required to refer the matter to the NCC to constitute the Dispute Resolution Panel with the power to arbitrate or mediate over the royalty dispute. Further, CMOs are prohibited from granting different royalty rates to different users except the peculiar circumstance of a particular user justifies such differential in royalty rates. In the same vein, the South African regulatory framework requires royalty rates to be negotiated between all CMOs and copyright users. It should be stressed, however, that the rule against differential rates is only expressly stated in relation to needletime CMOs. Nonetheless, from the decisions in the *NAB v SAMPRA* and *SAMPRA v Foschini* cases examined in chapter four, it is obvious that the courts will regard a royalty rate fixed for a user as excessive and discriminatory if it is higher than those fixed for other users in same class by both needletime and non-needletime CMOs. Indeed, as further assurances against abuse of dominance by CMOs in fixing royalties, the South African regulatory framework requires CMOs and/or users to refer a matter to the Copyright Tribunal when they cannot reach an agreement on royalty tariffs. In this regard, and as is apparent from the *NAB v SAMPRA* and *SAMPRA v Foschini* cases, there is some jurisprudential activity which aligns with the practice of the CJEU on

determination of excessiveness of royalty. Essentially, the SCA applied the market-comparison test and indicated unwillingness to apply the cost-price margin test.

Finally, competition law has been applied to regulate the relationship among CMOs by controlling reciprocal agreements. This has been done mainly by the CJEU which applied the TFEU on CMOs from EU member states in this regard and CISAC model agreements. Although, seen as ordinarily not restrictive of competition because of the efficiency they create in collective management, reciprocal agreements may weaken competition in the copyright management and licensing markets. However, national legislators cannot validly regulate reciprocal agreements which are more like bilateral or multi-lateral agreements between corporations. In this regard, the regulatory frameworks in Nigeria and South Africa cannot be regarded as inadequate for omitting to regulate such reciprocal agreements because, as confirmed by the SA Copyright Review Commission, national legislators cannot validly legislate over reciprocal agreements.

The discussion in this penultimate chapter so far was meant to highlight and examine specific CMOs' competition law related concerns and to lay the foundation for answering the specific research questions set out in chapter one of the thesis. The next and last chapter shall form the summary of the discussion in the thesis and specific answers to the research questions. The chapter will also include the general conclusion.

## **CHAPTER SIX: SUMMARY, RECOMMENDATIONS AND GENERAL CONCLUSION**

### **6.1 Introduction**

This thesis is purely doctrinal and was undertaken as a desk and library based research. It aimed to resolve the overarching research questions of whether the current regulation regime for CMOs in Nigeria and South Africa empower the relevant copyright sector-specific regulatory bodies to address the CMOs competition concerns in the copyright management and licensing markets in both countries; and if not, whether there is a need to apply competition law in regulating CMOs in both countries. To this end, the thesis addressed the following specific questions:

- a. How and why has collective management of copyright and related rights, and the regulation thereof, developed into its current forms?
- b. What, if any, are the key competition concerns that arise out of the dominant position that CMOs hold in the copyright management and licensing markets?
- c. Does the Nigerian copyright sector-specific regulatory framework for CMOs empower the relevant copyright sector-specific regulatory body to address the CMO's competition concerns in the copyright management and licensing markets in Nigeria?
- d. Does the South African copyright sector-specific regulatory framework for CMOs empower the relevant copyright sector-specific regulatory body to address the CMO's competition concerns in the copyright management and licensing markets in South Africa?
- e. How does competition law address the key CMOs' competition concerns in the copyright management and licensing markets?

Whereas chapter one set out the research objective and relevance, research questions, methodology, summary of research context and structure; chapter two focused on collective management and its competition related issues. More specifically, chapter two highlighted and discussed the meaning, classification, role of CMOs. It also identified and examined the related issues of the justification for collective management, the impact of digitisation on collective management and the competition concerns in collective management. It concluded with some important underlying



issues on the regulation of collective management. In this regard, the chapter addressed the relationship between copyright sector-specific regulation and competition law against the backdrop of the sector-specific industry regulation defence to competition law oversight. Chapters three and four were specifically devoted to discussing the regulation of CMOs in Nigeria and South Africa respectively. The chapters highlighted the history of collective management and its regulatory history, the types of CMOs, the regulatory agencies and the specific issues addressed by the regulatory framework in both countries. Chapter five then explained the interface between copyright and competition law and situated it within the context of collective management. Essentially, it discussed how competition law has been applied to CMOs and the specific issues the competition courts were concerned about. For this purpose, it echoed and relied on the findings of the Max Planck Report which is the most extensive and authoritative work so far in this regard. The Max Planck Report considered the law and practice of the European, the Court of Justice of the European Union (CJEU) and other competition jurisdictions from around the globe, including USA and India. It also relied on the EU Collective Rights Management Directive (CRM Directive) which was shaped by the CMO-competition related jurisprudence developed by the CJEU over a long period of time on the basis of art2.101 and 102 of the Treaty on the Founding of the EU (TFEU). This final chapter summarises the key findings of the preceding chapters, resolve the thesis' research questions based on these findings, draw some overarching conclusions and provide some recommendations.

## **6.2 Summary**

### **6.2.1 Regulation of CMOs in Nigeria and South Africa**

Although predominantly non-profit organisations, CMOs can take on the corporate structure of liability companies, partnerships, or cooperatives. In Nigeria, they are statutorily required to operate as non-profit companies limited by guarantee. No such statutory requirement exists in South Africa. Nevertheless, CMOs in South Africa are mostly non-profit organisations and private companies. CMOs are generally organisations of copyright owners, but they may sometimes be private companies acting as agents of copyright owners depending on the circumstances.

CMOs operate in the copyright management and licensing markets in Nigeria and South Africa. Through mainly utilising blanket licenses, and other transactional

licenses, they bridge the gap between copyright owners and users by enhancing access to copyright works by users while ensuring that copyright owners gain reward/compensation for their creative endeavours. Specifically, CMOs carry out the task of monitoring uses of copyright works, negotiating licenses with users, collecting royalties from the users and distributing the royalties among copyright owners on whose behalf the monitoring, licensing and collection was done. CMOs also engage in enforcement of copyright on copyright owners' behalf. CMOs also carry out certain socio-cultural functions through which they promote creativity and social welfare and hence ensure the realisation of copyright's ultimate goal. To perform these functions, CMOs obtain authorisation from copyright owners in Nigerian and South Africa. They also execute reciprocal agreements with foreign sister CMOs which enables them to represent the interest of foreign copyright owners locally, while the sister foreign CMOs represent the interest of Nigerian and South African copyright owners abroad. Thus, CMOs possess world repertoire which puts economies of scale and scope in their favour with which they solve the transaction cost problems in the copyright management and licensing markets: that is, the problems associated with the cost of searching, negotiating and obtaining licenses, collecting royalties, monitoring uses, among others on the part of copyright owners and users. Moreover, CMOs offer a platform of solidarity, aggregation and syndication which enables them to serve the interest of both small and large copyright owners, and thus preserving the public interest in the promotion of cultural creativity through the promise of equitable reward. In this regard, CMOs have a cross subsidisation effect for copyright owners: they help to reduce the administrative cost per copyright owner, increase the bargaining power per copyright owner as against large copyright users, afford risk-sharing platform for copyright owners, and provide specific support for copyright owners through special funds and promotional activities such as scholarship for up and coming creators.

CMOs' capacity to solve the transaction cost problem and afford copyright owners the platform of solidarity, aggregation and syndication, and ensure the promotion of creativity and social welfare are good arguments to justify CMOs' natural monopoly. As a result of their natural monopoly, CMOs occupy a dominant position in the copyright management and licensing markets. Their natural monopoly and their market dominance are not displaced by digitisation. This is so even though digitisation has seen the rise of online rights aggregators offering some of the major tasks

performed by CMOs (such as negotiation, collection and distribution of royalties) and made it possible for large copyright owners to manage their copyright individually.

In fact, some countries go a step forward to legally recognise CMOs' natural monopoly. Nigeria is an example of such country. The Nigerian regulatory framework promotes CMOs' monopoly through a concession system, subject to the discretion of the NCC. Section 39 of Nigerian Copyright Act empowers the NCC to not approve another CMO in respect of any class of copyright owners if it is satisfied that an existing approved CMO adequately protects the interest of that class of copyright owners. CMOs still maintain their natural monopoly stature in South Africa. The legal monopoly proposed for CMOs under the initially proposed s22B(6) of the original draft of the Copyright Amendment Bill has now been expunged from the latest draft of the Bill. Even so, legal provisions maintaining CMOs' natural monopolies have been regarded by competition courts to be suitable insofar as the law ensures effective collective management through regulation of the CMOs.

To prevent abuse of dominance by CMOs in the copyright management and licensing markets and preserve the public interest in the promotion of cultural creativity, regulations taking the form of copyright sector-specific regulations or dual-sector regulations interfacing copyright and competition law exist. Regardless of the form adopted, the principal objective of regulating CMOs is to prevent them from abusing their monopoly by subjecting them to efficiency, transparency and accountability standards in their relationship with copyright owners, users, and among themselves. Within the context of competition law, this objective is pursued by addressing specific competition concerns such as abuse of market dominance, excessive pricing (royalties), refusal to license, refusal to accept copyright owners as members, discrimination between copyright owners and discrimination between users, among others in the copyright markets. In this regard, competition courts accept CMOs monopoly because of the efficiencies they bring to the collective management and licensing markets. Thus, for the perspective of competition law, the issue is not whether CMOs should be allowed to exist as monopolies. The issue is how best to address CMOs competition concerns owing to their dominance in the collective management and licensing markets. This thinking shaped the competition rules that are being applied to CMOs in USA and under the EU.

Both the Nigerian and the South African regulatory frameworks are copyright sector-specific. While the Nigerian Copyright Commission (NCC) supervises CMOs

pursuant to the Nigerian Copyright Act, CMO Regulations and relevant provisions of CAMA in Nigeria, the Companies and Intellectual Property Commission (CIPC) regulates CMOs under the SA Copyright Act, Performers Protection Act, CS Regulations (applicable only to needletime CMOs) and the Companies Act in South Africa. Both Nigeria and South Africa have enacted competition legislations which are applicable to CMOs in principle, but have so far not been applied to them in practice. The competition legislations of both countries envisage the sector-specific industry regulation defence that are usually deployed by dominant firms to avoid competition oversight. The defence also brings to fore the possible conflicts that will arise between sector-specific industry regulators and competition law enforcers especially in industries, such as the collective management and licensing markets, requiring specialised skills and knowledge for effective supervision. Thus, the competition legislation of both countries provides frameworks that will enable competition concerns raised in sector-specific industries to be addressed by the regulators of those industries. For this purpose, however, it is important for that sector-specific regulation to contain rules that can be deployed to address those competition concerns. This thesis has so far been pre-occupied with answering the question whether the Nigerian and South African regulation regimes for CMOs empower the NCC and CIPC respectively to address CMOs' competition concerns in the collective management and licensing markets. The findings in this regard are highlighted in 6.3 below.

The Nigerian and South African regulatory frameworks both focus, among others, on the CMOs' relationships with copyright owners, with copyright users and among themselves. Specifically, the regulations in Nigeria make provisions relating to CMOs' corporate status, internal management, corporate governance, approval of CMOs, membership rules, royalty distribution, licensing practices, dispute resolution, number of CMOs, and cooperation among CMOs for effective collective management, among others. The South African regulatory framework makes provisions relating to accreditation of CMOs, membership, royalty distribution, licensing practices dispute resolution, internal management, among others. It does not expressly prescribe the number of CMOs per right or class of rights, corporate structure, and how CMOs may deal with non-member copyright owners' royalty.

### 6.2.2 Copyright, CMOs and competition law

Through different approaches, copyright and competition law pursue similar objective: the enhancement of consumer welfare by promoting dynamic competition which ensures continuity in creative endeavours. Copyright law vests copyright owners with exclusive rights which are limited by some substantive and time-based limitations and exceptions. In terms of competition law, such exclusive rights do not ordinarily confer market power on the copyright owners. However, the copyright owner may exercise the exclusive rights in a manner that weakens or stultifies competition in a given market to the advantage of the copyright owner. Thus, the exercise of copyright has been subjected to competition scrutiny under the rules against restrictive agreements, abuse of dominance and under merger control.

CMOs, as repositories of copyright from several owners, are classic manifestation of market power and dominance in the copyright markets. Thus, they are subjected to competition law oversight to address the specific competition concerns highlighted in 6.2.1 above. To address these concerns, some scholars believe that regulation regimes should promote competition among CMOs for the same class of copyright. Such regulations should remove the incentives that make CMOs natural monopolies. Others are of the view that regulation contributes to entrenching CMOs natural monopoly. To these scholars, competition among CMOs should be left to market forces with regulation playing a minimal oversight role. Still, some other scholars contend, and this thesis aligns with this view, that efficiency, accountability and transparency will be better achieved in collective management if regulation preserves CMOs' natural monopoly while creating room for some form of competition among copyright owners within the CMOs' fold. These scholars rightly suggest that this will effectively promote cultural creativity and dynamic competition, hence serving the collective goal of copyright and competition law.

The application of competition law to CMOs developed along these lines in major competition law jurisdictions such as the US and EU. While recognising CMOs' market power, competition courts have subjected them to scrutiny under competition law through the rule of reason approach. Essentially, the courts have engaged in a balancing exercise by weighing CMOs' functions against copyright owners' freedom to exploit the copyright in their works, the need for effective collective management and the need to foster competition in the copyright market. In this regard, competition courts have deployed the rules against restrictive agreements, abuse of market

dominance and merger control to address the competition concerns stated in 6.2.1 above. These rules are manifest in CMOs' relationship with copyright owners, users, and among themselves.

In addressing the competition concerns, focus was mainly on CMOs' capacity to refuse copyright owners falling within their repertoire and the extent to which CMOs can restrict copyright owners' exclusive rights: that is, whether CMOs can insist on exclusive licenses for all uses and for the whole world of both current and future works of copyright owners; and whether CMOs can unreasonably restrict copyright owner's right to withdraw or terminate their license. Competition law oversight also extends to CMOs licensing practices. The focus here was about the capacity of CMOs to fix royalty rates and the extent to which they can discriminate against users when granting licenses. On the relationship among CMOs, the focus was on reciprocal agreements.

### **6.3 Resolving the main research questions**

This part seeks to resolve the first limb of the main research questions: that is, (a) whether the current regulation regimes for CMOs in Nigeria and South Africa empower the relevant copyright sector-specific regulatory bodies to address the CMO's competition concerns in the copyright management and licensing markets in both countries? The question is addressed in three parts: the relationship between CMOs and copyright owners, CMOs and users, and between different CMOs. the second limb of the research question is addressed in 6.4 below.

#### **6.3.1 Relationship between CMOs and copyright owners**

In this context, competition law relates to the duty of CMOs to accept all copyright owners of works forming their repertoire, failure of which may be regarded as abuse of dominance. It also relates to the prohibition of CMOs from requiring copyright owners to grant them exclusive license to administer copyright for the whole world and for all uses; and placing unreasonable restriction on copyright owners' capacity to terminate or withdraw their mandates.

As gleaned from the discussion in 5.3.2 above, whereas the Nigerian regulatory framework adequately addresses this concern, the South African regulatory framework does not. In particular, the Nigerian regime places a duty on CMOs in Nigeria to accept all copyright owners of works forming their repertoire. It also prohibits such CMOs

from requiring exclusive licenses from copyright owners and empowers copyright owners to withdraw their mandates from CMOs subject to reasonable notice. On the other hand, the South African framework places an express duty only on needletime CMOs to accept all owners of needletime rights. There is no such duty on non-needletime CMOs. The framework does not expressly prohibit all CMOs in South Africa from requiring exclusive licenses from copyright owners, neither does it expressly empower copyright owners to withdraw their mandates from CMOs. The proposed s22C(1) of the CAB does not completely address this gap. Although it will empower copyright owners to withdraw their mandate from CMOs, it will also enable CMOs to demand exclusive licenses from copyright owners. The better approach, from a competition law perspective, is to expressly prohibit CMOs from requiring exclusive authorisations from copyright owners.

### **6.3.2 Relationship between CMOs and users**

Competition law has been applied under the TFEU by the Court of Justice of the European Union to control the royalty rates fixed by CMOs. The rules against excessive pricing were applied to control the fixing of excessive royalty rates by CMOs. Connected to this is the prohibition of the fixing of differential rates for users except on justifiable grounds. Competition law rules relating to the refusal to deal are relevant to the refusal to license by CMOs. However, competition courts, have been hesitant to apply the rules to CMOs.

Based on the discussion in chapter 5.3.3, both the Nigerian and South African copyright regulatory frameworks adequately address these competition law concerns. Specifically, the Nigerian regulatory regime makes provisions to check excessive royalty rates by Nigerian CMOs. It requires the CMOs to fix and/or change royalty tariffs, subject to negotiations with users or user groups. The CMOs are also obligated to notify the NCC of any agreement reached based on such negotiations. In the event that no agreement is reached, the parties are required to refer the matter to the NCC to constitute the Dispute Resolution Panel with the power to arbitrate or mediate over the royalty dispute. Further, CMOs are prohibited from granting different royalty rates to different users except the peculiar circumstance of a particular user justifies such differential in royalty rates. In the same vein, the South African regulatory framework requires royalty rates to be negotiated between all CMOs and copyright users. It should be stressed, however, that the rule against differential rates is only expressly stated in

relation to needletime CMOs. Nonetheless, from the decisions in the *NAB v SAMPra* and *SAMPRA v Foschini* cases examined in chapter four, it is obvious that the courts will regard a royalty rate fixed for a user as excessive and discriminatory if it is unreasonably higher than those fixed for other users in the same class by both needletime and non-needletime CMOs. Indeed, as further assurances against the abuse of dominance by CMOs in fixing royalties, the South African regulatory framework requires CMOs and/or users to refer a matter to the Copyright Tribunal when they cannot reach an agreement on royalty tariffs. In this regard, and as is apparent from the *NAB v SAMPra* and *SAMPRA v Foschini* cases, there is some jurisprudential activity which aligns with the practice of the CJEU on determination of excessiveness of royalty. Essentially, the Supreme Court of Appeal (SCA) applied the market-comparison test and indicated unwillingness to apply the cost-price margin test.

### **6.3.3 Relationship among CMOs**

Competition law has been applied to regulate the relationship among CMOs by controlling reciprocal agreements. This has been done mainly by the CJEU which applied the TFEU on CMOs from EU member states and on CISAC model agreements. Although, seen as ordinarily not restrictive of competition because of the efficiency they create in collective management, reciprocal agreements may weaken competition in the copyright management and licensing markets.

As argued in chapter 5.3.4, national legislators cannot validly regulate reciprocal agreements as these are akin to bilateral or multi-lateral agreements between corporations. Therefore, it is submitted that the regulatory framework in Nigeria and South Africa cannot be regarded as inadequate for omitting to regulate reciprocal agreements. However, it seems arguable that to the extent that reciprocal agreements may weaken or restrain competition in the respective copyright management and licensing markets in both countries, the agreements may come under judicial scrutiny locally. A reciprocal agreement may weaken competition in a given market, for instance, if it amounted to concerted efforts between the parties to the agreement and has the effect of limiting copyright owners' ability to become members of any CMO of their choice or of more than one CMO at the same time in Nigeria or South Africa, as the case may be. The argument finds support in the South African cases of *Pioneer Hi-Bred International v Competition Commission* and *Nestle SA v Infant Nutrition Business of Pfizer Inc* examined in 5.2.3.3. Although the cases related to a proposed



merger between local firms and international firms through their local subsidiaries, the approach adopted by the SA Competition Appeal Court and the SA Competition Tribunal respectively are relevant here. Specifically, the *Pioneer Hi-Bred International* case involved the transfer of trademark as part of the proposed merger. In both cases, the courts were concerned about the effect of the proposed mergers on competition in the respective markets. The courts upheld the mergers because their implementation would promote competition in the markets. In effect, the mergers would have been rejected by the courts if their effect was to weaken or restrain competition in the respective markets.

#### **6.4 Resolving the second limb of the main research question: recommendations**

As far as the second limb of the research question is concerned – that is, whether there is a need for competition law to be applied in regulating CMOs in Nigeria and South Africa, it is strongly submitted that there is no such need in Nigeria since the copyright sector-specific regulatory framework already stipulate rules that can be deployed by the NCC to address the CMO' competition law concerns. Hence, there will be no need to apply the Nigerian Competition Act to CMOs in Nigeria. Indeed, the rules contained in the CMO regulation regime can act as a basis for an agreement between the NCC and the Federal Competition and Consumer Protection Commission envisaged under ss104 to 106 of the Nigerian Competition Act for the exemption of CMOs from the regulatory oversight under the Nigerian Competition Act.

The same cannot be said of the South African copyright sector-specific regulatory framework. There is a need to apply the SA Competition Act to CMOs in South Africa. As gleaned from the discussions in this thesis, while the regulatory framework empowers the CIPC to address the competition law concerns in respect of the relationship between CMOs and users, there are identified regulatory gaps with regards to the relationship between CMOs and copyright owners. This is because, first, the duty to accept copyright owners as members is statutorily expressed only in relation to needletime CMOs. There is no such duty on non-needletime CMOs. Secondly, although copyright owners are empowered to transfer their copyright in existing and further works, there is no express statutory restraint on CMOs from restricting the exclusive rights of copyright owners. The CS Regulations only provides some indirect restraint in that CMOs are accredited under it for administration of needletime rights only.

The Copyright Amendment Bill will not take care of some of these gaps when/if it comes into force. A new s22C(1)(b) is being proposed, which seeks to empower copyright owners to withdraw authorisation granted to CMOs. The proposed section can also be interpreted to extend to CMOs duty to open their membership to copyright owners within the class of the CMOs' repertoire. Unfortunately, the proposed s22C(1)(a) of the Copyright Amendment Bill seeks to enable CMOs to require exclusive authorisation from copyright owners in South Africa and hence potentially missing the opportunity to address this specific competition law concern. However, the tides can still be turned especially since the legislative process of enacting the Copyright Amendment Bill is still on-going. The Copyright Amendment Bill will have to be further revised before enactment to take care of this and other gaps identified in the current copyright sector-specific regulation in South Africa. To sufficiently address the CMOs' competition law concerns, the following provisions should be (re)introduced to the Copyright Amendment Bill:

- The proposed s22B(6) initially proposed in the original draft should be reintroduced in the latest draft of the Bill. This will take care of the one-society-one-right proposed by the Copyright Review Commission. In terms of competition law, such provisions have been upheld as necessary for effective collective management. Also, contrary to fears elsewhere, it will help streamline copyright licenses by taking care of the transaction costs problems on the part of users. Further, it will help strengthen the bargaining platform for copyright owners vis-à-vis users and the government. Moreover, it will enhance the socio-cultural role of CMOs.
- A clear prohibition should be introduced which will prevent CMOs from requiring exclusive licenses/authorisation from copyright owners. This will complement the provision relating to copyright owners' right to withdraw a mandate given to a CMO. In terms of competition law, both provisions will effectively forestall CMOs powers to unreasonably restrain copyright owners' exclusive rights.

Overall, the following recommendations may be useful to fill other important gaps in the Bill:

- a. It is commendable that the Bill already seeks to bring all CMOs in South Africa within the regulatory powers of the CIPC through the requirement of

accreditation certificate to operate as a CMO. To make this proposal effective, however, a provision for the consequences of refusal/failure by a CMO to obtain accreditation should be introduced. The provision may place an express restriction on the right of the CMO to operate without accreditation, the right to enforce any claim under the SA Copyright Act, or, in the extreme, make it a crime to operate without a license. Similar provisions can be found in ss17 and 39(4) of the Nigerian Copyright Act.

- b. It is also commendable that the Bill seeks to bring the activities of CMOs in South Africa within the control of their members. In this regard, the provision in the proposed s22D(3) regarding the three-year period for the distribution of royalties should be revised to distribution at the end of each financial year. There is no clear justification for such three-year deadline. Moreover, the three-year deadline is against the established practice by CMOs: distribution at the end of each financial year. Further, the proposed s22D(3) does not address the specific and important issue of how CMOs should deal with royalties belonging to non-members copyright owners. The use of blanket licenses makes it inevitable for CMOs to collect royalties belonging to non-members copyright owners. However, such royalties must be dealt with appropriately and in the absence of a clearly defined mode of dealing with them, CMOs may misappropriate such royalties. To this end, the provision in reg11 of the Nigerian CMO Regulations is a useful guide. The regulation prescribes that CMOs establish a holding account into which such royalties will be deposited for a maximum period of 7years, within which the CMOs must make effort to trace the non-members copyright owners. Thereafter, amounts in the holding account at the end of the 7years falls into the general revenue of the CMOs for distribution in the current accounting period.

## **6.5 General conclusion**

CMOs are regulated in both Nigeria and South Africa. It is settled that such regulation is necessary in both jurisdictions. However, one unresolved major question has been whether the existing copyright regulatory frameworks are effective in ensuring efficiency, accountability and transparency in collective management, which are the major goal of regulation. Existing literature from Nigeria and South Africa has addressed the question mainly from the perspectives of corporate governance, tariff

and licensing practice and general operation of CMOs, with some alluding to collecting societies' natural monopoly and their regulation under competition law.

From a competition law perspective, the main goals of efficiency, accountability and transparency in collective management are pursued by addressing specific CMOs' competition concerns, such as abuse of market dominance, excessive pricing (royalties), refusal to license, refusal to accept copyright owners as members, discrimination between copyright owners and discrimination between users in the copyright management and licensing markets. This thesis' main focus has been on whether the current regulation regime for CMOs in Nigeria and South Africa stipulate rules that can be deployed by the relevant copyright sector-specific regulatory bodies to address these CMOs competition concerns in the copyright management and licensing markets in both countries; and if not, whether there is a need to apply competition law in regulating CMOs in both countries. In resolving these questions, the thesis addressed the specific sub-questions highlighted in 6.1 above.

The thesis' key contributions are both the approach adopted in addressing the questions and the conclusions reached. However, it should be noted that it did not consider the level of compliance by CMOs with the current copyright regulatory frameworks in Nigeria and South Africa. This is an important question that would require further research. It also did not seek to conclusively resolve the question of how competition law may be applied to CMOs especially in South Africa where there are observable regulatory gaps, from a competition perspective, in the copyright-sector specific regulatory framework for CMOs. This said, it suggested some application possibilities based on competition matters in other fields.

## BIBLIOGRAPHY

### PRIMARY SOURCES

#### A. Statutes, Regulations and Notices

##### 1 Nigeria

Company and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004

Company and Allied Matters Act (Repeal and Re-enactment) Bill, SBs 355 and 384, 2018

Constitution of the Federal Republic of Nigeria, 1999

Copyright (Amendment) Decree, No. 42 1999

Copyright (Amendment) Decree, No. 98 1992

Copyright (Collecting Societies) Regulation, 1993

Copyright (Collective Management Organisations) Regulation, 2007

Copyright (Dispute Resolution Panel) Rules, 2007

Copyright (Levies on Materials) Order, 2012

Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004

Copyright Decree, No 47 1988

Copyright Decree, No. 61 1970

Draft Copyright Bill 2015

Federal Competition and Consumer Protection Act, 2018

Fundamental Rights (Enforcement Procedure) Rules, 1979

Interpretation Act Cap I23, Laws of the Federation of Nigeria, 2004

Investment and Security Act No. 29, 2007

Nigerian Communication Act-Competition Practice Regulation, 2007

Nigerian Communication Act, 2003

##### 2 South Africa

Arbitration Act 42 of 1965

Companies Act 71 of 2008

Competition Act 89 of 1998

Competition Amendment Bill, 2017 GN No.1345 in GG No. 41294 of 1 December 2017

Competition Second Amendment Act 39 2000  
 Constitution of the Republic of South Africa, 1996  
 Copyright Act 63 of 1965  
 Copyright Act 98 of 1978  
 Copyright Amendment Act 9 of 2002  
 Copyright Amendment Bill, B13-2017, *GG* No. 40121 of 5 July 2016  
 Copyright Regulation, GN R2530 in *GG* 6252 of 22 December 1978  
 GN No. 136, *GG* No.11717 of 3 March 1989  
 GN No. 577, *GG* No. 35530 of 19 July 2012  
 GN No. 680, *GG* No. 39066 of 7 August 2015  
 GN No. R. 848, *GG* No. 35791 of 19 October 2012  
 GN Nos. 1068 and 1069, *GG* No. 38232 of 28 November 2014  
 Intellectual Property Law Amendment Act 28 of 2013  
 Patent Acts 57 of 1978  
 Patent, Designs, Trade Marks and Copyright Act 9 of 1916  
 Performers Protection Amendment Act 8 of 2002  
 Performers' Protection Act 11 of 1968  
 Regulations on the Establishment of Collecting Society in the Music Industry, GN 517 in *GG* 28894 of 1 June 2006

### **3 Other Jurisdictions**

Act on Copyright in Literary and Artistic Works, Swedish Statute Books, SFS, 1960:729, Art. 42h  
 Act on the Supervision of Collective Management Organizations for Copyright and Related Rights, 2003 (Netherlands)  
 Administration of Justice Act 1965 (UK)  
 Australian Copyright Act, Act No. 63, 1968 (Compilation No. 45, 2015)  
 Austrian Collecting Societies Act, 2006  
 Collecting Societies Tariffs, Legal Notice No. 57, Kenya Gazette Supplement No. 56 of 21 April 2017  
 Consolidated Act on Copyright, Consolidated Act No.1144, 2014 (Denmark)  
 Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (United Kingdom)

Copyright Act 2001, Chapter 130, Laws of Kenya, 2014  
 Copyright Act No. 2 of 1961, Arts 13, 16a and 36 (Norway)  
 Copyright Act No. 404 of 1961 (Finland)  
 Copyright Act No. LXXVI. of 1999 (Hungary)  
 Copyright Act No.73 of 1972 (Iceland)  
 Copyright Act of 1956 (United Kingdom)  
 Copyright Act, 1911 [1 & 2 Geo. 5. Ch. 46] (United Kingdom)  
 Copyright Act, 1965 (Federal Law Gazette I, p. 1273) (Germany)  
 Copyright Act, 1989 (Malawi)  
 Copyright Act, Statutes of Canada, 1985, c.C-42  
 Copyright and Neighbouring Rights Act (Chapter 26:05) 2000 (Zimbabwe)  
 Law No. 95-4 of 3 January 1995, Supplementing the Intellectual Property Code and  
 Relating to the Collective Management of the Reproduction Right by Reprography  
 (France)  
 Law on the Administration of Copyright and Neighbouring Rights, 1995 (Germany)  
 Musical Works Modernization Act, 2018  
 Patents, Designs and Trademarks Act 1883 (UK)  
 Statute Law (Miscellaneous Amendment) Act No. 11 of 2017  
 Statute Law (Repeals) Act 1969 (UK)  
 Statute Law Revision Act 1868 (UK)  
 Statute of Monopolies 1623, Chapter 3 21 Ja 1  
 The Constitution of Kenya, 2010

## **B. Treaties**

Beijing Treaty on Audiovisual Performances, 2012  
 Berne Convention for the Protection of Literary and Artistic Works, 1886  
 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of  
 the rules on competition laid down in Articles [101 TFEU and 102 TFEU]  
 EU Directive on Collective Management of Copyright and Related Rights and Multi-  
 Territorial Licensing of Rights in Musical Works for Online use in the Internal  
 Market (2014) Directive 2014/26/EU  
 International Covenant on Economic, Social and Cultural Rights, 1966

Rome Convention for the International Protection of Performers, Producers of Phonograms, and Broadcasting Organisations, 1961

Treaty on the Functioning of the European Union (2012/C326/01)

United Nations Declaration on Human Rights, 1948

WIPO Copyright Treaty, 1996

WIPO Performances and Phonograms Treaty, 1996

World Trade Organisation's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights, 1995

### **C. Cases**

*Adeokin Records v MCSN*, SC. 336/2008, Supreme Court (13 July 2018)

*Anikulapo-Kuti v Iseli* [2003-2007] 5 I.P.L.R. 53-73

*APPH Ltd v Wednesbury* [1948] 1 KB 224

*Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome*, unreported case C-177/16

*Basinco Motors Ltd v Woermann-Line* (2009) LPELR S.C. 24/2003

*Berkey Photo, Inc. v Eastman Kodak Co.* 603 F 2d 263, 294 (2nd Cir 1979)

*BMI v CBS*, 441 U. S. 1 (1979)

*Board of Education v Rice* [1911] AC 179.

*BRT v SABAM* (1974) ECR 51.

*CARFAC v National Gallery of Canada* [2014] 2 SCR 197-211

*CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339

*Chigbu v Tonimas* (2006) 9 NWLR 984 189

*CISAC v European Commission*, unreported case T-442/08

*CompCom SA v Edgars Consolidated Stores Ltd* [2003] ZACT 19

*CompCom SA v Pioneer Hi-Bred International* [2013] ZACC 50

*CompCom SA v Primedia Ltd & Anor*, unreported case CR191Mar12

*CompCom SA v Telkom* [2009] ZASCA 122

*Commission Decision* COMP/C2/38.698 – CISAC of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

*Commission Decision* No. COMP/C2/38.014 – IFPI 'Simulcasting' of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement



- Compact Disc Tech. Ltd v MCSN* 53 NIPJD [CA. 2010] 787/2008
- COSON v MCSN & Ors*, unreported Suit No.: FHC/L/CS/1259/2017
- COSON v. MTN Nigeria Communications Limited*, unreported Suit No: FHC/L/CS/619/2016
- COSON v NTA-Star TV Network*, unreported case no NCC/DRP/001/2016
- DW Integrators CC v SAS Institute (Pty) Ltd* [1999–2000] CPLR 191
- EMTS Ltd v MTN Nigeria & Anor.*, unreported Suit No.: FHC/L/CS/130/2016
- FICCI – Multiplex Association of India v. UPDF and Ors*, (CCI) unreported Case No. 01 of 2009
- Foschini v SAMPRA* [2013] ZAGPPHC 304
- GlaxoSmithKline v David Lewis & Ors* [2006] ZACAC 6
- Glaxo Wellcome (Pty) Ltd v NAPW* [2002] ZACAC 3
- Greenwich Film v SACEM* [1979] ECR 2811
- Gramophone Co. Ltd v Cowardine* (1934) Ch 450
- Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* [2006] SCA 39 (RSA)
- Hazel Tau v Glaxo and Boehringer* (Unreported)
- Higher Regional Court Cologne, September 28, 2007, Foreign Copyright Collective, (2008) Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 69.
- IMS Health* Case C-418/01
- In Re Certification of the Constitution of the Republic of South Africa 1996* (1996) 4 SA 177
- Johannesburg Operatic and Dramatic Society v Music Theatre International* (1969) 2 Patent Journal, 223
- Juma v KECOBO* [2018] eKLR
- Kisumu Bar Owners Association & Anor. v MCSK*, unreported Petition Number 11 of 2017
- Laban Juma Toto & Anor. v KECOBO and Ors*, unreported Petition Number 3 of 2017
- Laban Juma Toto & Anor. v KECOBO and Ors*, unreported Petition Number 3B of 2017
- Laugh it Off v SAB International* 2005 (2) SA 46 (SCA)
- Lawal v Ejidike* (1997) 2 NWLR Pt 487 319
- Lucazeau* [1989] ECR 2811

*M/s HT Media Limited v M/s Super Cassettes Industries Limited*, (CCI) unreported Case No. 40 of 2011

*MCSN v Adeokin* (2007) 13 NWLR Pt1052 616

*MCSN v Adeokin*, unreported Suit No.: FHC/L/CS/216/96

*MCSN v CBS*, unreported Appeal No.: CA/L/576/2014

*MCSN v Compact Disc* 51 NIPJD [FHC. 2008] 713/2007

*MCSN v COSON*, unreported Suit No. FHC/L/CS/377/2013

*MCSN v COSON*, unreported Suit No.: FHC/L/CS/377/2013, 13

*MCSN v Detail* [1990] IPLR 260.

*MCSN v Compact Disc Technology Ltd & Ors.*, SC. 425/2010 (14 December 2018)

*MCSN v Detail*, unreported Appeal No.: CA/L/506/1999

*MCSN v Details Nigeria Ltd.* 39 NIPJD [FHC. 1996] 434/1995

*MCSN v NCC* 56 NIPJD [FHC. 2013] 1163/2012

*MCSN v NCC* Appeal No.: CA/L/575/2009

*MCSN v NCC*, unreported Suit NO. FHC/L/CS/35/2008

*Mercy Munee Kingoo v Safaricom Ltd* [2016] eKLR

*Mercy Munee Kingoo v Safaricom Ltd*, (MLD) unreported Const. Petition No.5 of 2016

*Microsoft v Commission*, unreported case T-201/04

*Military Governor, Imo State v. Nwauwa* (1997) 2 NWLR Pt490 675

*Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] ZAGPHC 47

*Moneyweb (Pty) Ltd v Media24 Ltd* [2016] 3 All SA 193.

*Moss gas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321.

*Multichoice v MCSN*, unreported Suit No: FHC/L/CS/1091/11

*NAB v SAMPRA* [2014] ZASCA 10

*National Soccer League v Gidani* [2014] ZAGPJHC 333

*NCC v MCSN*, unreported Appeal No: CA/L/350/2013

*NCC v MCSN*, unreported Appeal No: CA/L/925/11

*Nestle SA v Infant Nutrition Business of Pfizer Inc.* [2013] ZACT 16

*OSA v Lecebne Lazne*, unreported case C-351/12.

*Pepcor Retirement Fund v FSB* [2003] 3 All SA 21.

*Phumelela Gaming v Grundlingh* 2007 (6) SA 350 (CC)

*Pioner Hi-Bred International v CompCom SA* [2012] ZACAC 3

*PMRS v NCC*, unreported Suit No: FHC/L/CS/61/2007

*PMRS v Skye Bank* (2017) LPELR-43198

*PPC Ltd v Adophy* [1977-2989] 2 IPLR 251-298 at 295-295

*Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, unreported case C-241/91, 1995

*SABC v Via Vollenhoven* [2016] 4 All SA 623.

*SAMPRA v Foschini* [2015] ZASCA 188

*SAMPRA v Kadi Petje & Ors.*, unreported case no 9085/2010

*SAMRO v SAMPRA & Ors.*, unreported case no 42008/13

*Scandlines Sverige AB v Port of Helsingborg* Unreported case COMP/A.36.568/D3 (23 July 2014)

*Shapiro v SARRAL*, unreported case no 14698/04

*Standard Bank Investment Corporation v CompCom SA* (2000) 2 SA 810

*Tournier* [1989] ECR 2521

*Verizon Communications v. Law Offices of Curtis V. Trinko* 540 U.S. 398, 408 (2004)

*Visafone v MCSN* (2013) 5 NWLR Pt 1347, 250

*Volvo v Veng* [1988] ECR 6211

*Xpedia Management Limited v The Attorney General* [2016] eKLR

## SECONDARY SOURCES

### A. Reports, Comments, Official Statements, Discussion and Working Papers

Anderson, RD and Kovacic, WE ‘The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change’ (2017) *WTO Staff Working Paper ERSD-2017-2013*

Bureau of Communication and Arts Research ‘Review into the Efficacy of the Code of Conduct for Australian Copyright Collecting Societies’ (Discussion Paper, 2017) available at

<https://www.communications.gov.au/file/29866/download?token=FljXCAzd>

CISAC *Global Collections Reports 2018 for 2017 Data* (2018) available at <https://www.cisac.org/CISAC-University/Library/Global-Collections-Reports/Global-Collections-Report-2018>, accessed on 1 March 2019

ComC *Years of Competition Enforcement – A People’s Account* (2014) 13-15 available at <http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf>

*Competition Tribunal Annual Report 2000/2001* (2001) available at <https://www.comptrib.co.za/assets/Uploads/Reports/Annual-Reports/Annual-report-2000-1.pdf>

CompCom SA ‘Commission Non-Refers Doctors Without Borders Complaint’ (16 September 2014) available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Commission-non-refers-Doctors-Without-Borders-complaint.pdf>

CompCom SA ‘South Africa’s Experience in the Pharmaceuticals Industry’ (2015) *UNCTAD 5* available at [http://unctad.org/meetings/es/Presentation/CCPB\\_7RC2015\\_RTPharma\\_SouthAfrica\\_en.pdf](http://unctad.org/meetings/es/Presentation/CCPB_7RC2015_RTPharma_SouthAfrica_en.pdf)

DAC Mzansi’s *Golden Economy – Contribution of Arts, Culture and Heritage Sector to the New Growth Plan* (2011) available at <http://www.gov.za/sites/www.gov.za/files/mzansi%20golden%20economy%2020110411.pdf>

Department of Arts and Culture ‘Address by Minister Nathi Mthethwa at the South African Music Awards (SAMA22) in 4 June 2016’ available at <http://www.dac.gov.za/content/address-minister-nathi-mthethwa-south-african-music-awards-sama22-durban>

Department of Arts, Culture, Science and Technology *Music Industry Task Team Report* (2001)

Department of Trade and Investment *Copyright Review Commission Report* (2011)

Drexler, J *Copyright, Competition and Development* (2013)

Drexler, J et al ‘Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372’ (2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2208971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208971)

DTI ‘Copyright Amendment and Performers Protection Amendment Bills: Presentation to the Portfolio Committee of Arts and Culture’ (16 May 2017) available at <https://www.thedti.gov.za/parliament/2017/Copyright.pdf>

DTI ‘Presentation to the Subcommittee: Trade and Industry – Regulation of Collecting Societies’ (28 March 2018) available at [https://www.thedti.gov.za/parliament/2018/SubCommittee\\_Copyright.pdf](https://www.thedti.gov.za/parliament/2018/SubCommittee_Copyright.pdf)

DTI ‘The dti hosts a conference on copyright law changes’ (2015), available at <http://www.thedti.gov.za/editmedia.jsp?id=3445>

DTI *Draft Intellectual Property Policy of the Republic of South Africa Phase I* (2017)

EC Recommendation on collective rights management of music on the Internet (2005) Recommendation 2005/737/EC

EU Commission ‘Communication from the Commission – Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (2009/C 45/02) Official Journal of the European Union available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN), accessed 4 March 2019

EY *Cultural Times – The First Global Map of Cultural and Creative Industries* (2015) available at <http://www.cisac.org/Cisac-University/Library/Studies-Guides/Cultural-Times-The-First-Global-Map-of-Cultural-and-Creative-Industries>

Federal Government of Nigeria *Draft Competition and Consumer Protection Policy* (2014)

Ficsor, M ‘The international copyright treaties and collective management – key issues (background paper)’ (2009) available at [http://www.zis.gov.rs/upload/documents/pdf\\_en/pdf/seminari/15sep2009\\_copyright\\_protection.pdf](http://www.zis.gov.rs/upload/documents/pdf_en/pdf/seminari/15sep2009_copyright_protection.pdf)

Gray, E and Seeber, M *PICC Report on Intellectual Property Rights in the Print Industry Sector* (2004) available at

[http://www.publishsa.co.za/downloads/intellectual\\_property\\_report.pdf](http://www.publishsa.co.za/downloads/intellectual_property_report.pdf)

Hargreaves, I *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) available at

[https://orca.cf.ac.uk/30988/1/1\\_Hargreaves\\_Digital%20Opportunity.pdf](https://orca.cf.ac.uk/30988/1/1_Hargreaves_Digital%20Opportunity.pdf)

Hilty, R and Nerisson, S ‘Collective Copyright Management and Digitization: The European Experience’ (2013) *MPIIPCL Research Paper No.13-09*

Institute of Directors Southern Africa *KING IV Report on Corporate Governance for South Africa 2016* (2016) available at

[https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king\\_iv/King\\_IV\\_Report/IoDSA\\_King\\_IV\\_Report\\_-\\_WebVe.pdf](https://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/king_iv/King_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf)

Karjiker, S and Jooste, C ‘Commentary on the Copyright Amendment Bill 2017’ (2017) available at <http://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf>

KECOBO ‘Public Notice: Clarification on CMOs Licensed by KECOBO to Collect Royalties in 2018’ 25 January 2018

Letter of the Minister of Justice and Attorney General of the Federation (MoJ/AGF) to the Director General of NCC, N.I.149/1, 22 March 2017

Monyatsi, KN *Survey on the Status of Collective Management Organizations in ARIPO Member States* (2015)

NAB ‘The national association of broadcasters’ submission to the department of trade and industry on the copyright amendment bill’ (2017) available at [http://www.nab.org.za/uploads/files/NAB\\_Submissions\\_-\\_Copyright\\_Amendment\\_Bill\\_2017\\_%28execution\\_version%29.pdf](http://www.nab.org.za/uploads/files/NAB_Submissions_-_Copyright_Amendment_Bill_2017_%28execution_version%29.pdf)

NCC ‘Collective Administration in the Music Industry’ (6 May 2005)

NCC ‘Medium term corporate plan and strategy (2012-2014)’ available at [http://kyg.nigeriagovernance.org/Attachments/Organization/Mtss/158\\_MTSS\\_Nigerian%20Copyright%20Commission%20\(NCC\).pdf](http://kyg.nigeriagovernance.org/Attachments/Organization/Mtss/158_MTSS_Nigerian%20Copyright%20Commission%20(NCC).pdf)

NCC ‘Programmes, Achievements and Challenges in 2016’ (2016) available at [http://www.copyright.gov.ng/index.php/reports-services/item/download/18\\_0b4f48cb9e2743016bd4389233aa3674](http://www.copyright.gov.ng/index.php/reports-services/item/download/18_0b4f48cb9e2743016bd4389233aa3674)

NCC’s letter to COSON’s general manager dated 19 February 2018

NCC’s Letter to the General Manager, COSON dated 3 May 2018

NCC’s Letter to the General Manager, COSON dated 30 April 2018 (in file with author)

NCC, ‘Text of press briefing by the Director General, Nigerian Copyright Commission, Mr. Afam Ezekude, on the dispute in the governing board of Copyright Society of Nigeria Ltd/Gte (COSON)’ available at <http://copyright.gov.ng/index.php/news-events/item/427-text-of-press-briefing-by-the->

*director-general-nigerian-copyright-commission-mr-afam-ezekude-on-the-dispute-in-the-governing-board-of-copyright-society-of-nigeria-ltd-gte-coson*

NFVF *South African Film Industry Economic Baseline Study Report* (2013) 6  
available at <http://nfvf.co.za/home/22/files/Baseline%20study.pdf>

OECD 'Competition law and policy in South Africa' (2003) *OECD Global Forum on Competition Peer Review*

Okoroji, T 'COSON extra-ordinary general meeting December 15, 2016, chairman address' available at <http://www.cosonng.com/coson-extra-ordinary-general-meeting-december-15-2016-chairmans-address/>

PASA 'Annual Book Publishing Industry Survey 2016' (January 2018) available at <http://www.publishsa.co.za/file/1519203677awr-2016publishingindustrysurvey.pdf>

Pham, A *Competition law and intellectual property rights: Controlling abuse or abusing control?* (2008)

Pouris, A and Inglesi-Lots, R *The economic contribution of copyright-based industries in South Africa* (2011)

SAMRO 'Integrated Report 2015' 27 available at [http://www.samro.org.za/sites/default/files/Samro\\_IR\\_9175\\_FULL%20IR\\_4Nov\\_WEB\\_FINAL%20REPORT.pdf](http://www.samro.org.za/sites/default/files/Samro_IR_9175_FULL%20IR_4Nov_WEB_FINAL%20REPORT.pdf)

SAMRO 'Integrated Report 2016' 12 available at [http://www.samro.org.za/sites/default/files/SAMRO\\_IR\\_10070\\_\\_1Nov\\_V4e\\_LN\\_FinalWebDocument%20%281%29.pdf](http://www.samro.org.za/sites/default/files/SAMRO_IR_10070__1Nov_V4e_LN_FinalWebDocument%20%281%29.pdf)

Schwemer, SF 'Emerging models for cross-border online licensing and user-generated law' (2015) *UCFLLS Research Paper Series*, Paper No. 2015-9

Senate Committee on Trade and Investment 'Executive Summary' 6 available at <http://placng.org/wp/wp-content/uploads/2018/05/Executive-Summary-of-a-Bill-for-an-Act-to-Repeal-the-Companies-and-Allied-Matters-Act-1990-and-Enact-the-Companies-and-Allied-Matters-Act-2018.pdf>

Standing Committee on the Copyright Act *Report on the Needle Time and Blank Tape Levy* (1993)

Street, J et al 'Collective management organisations, creativity and cultural diversity' (2015) *CREATe Working Paper* 2015/03

UCT's IP-Unit 'South African Copyright Amendment Bill, 2017: Comments' (2017) available at [http://ip-unit.org/wpcontent/uploads/2017/07/CopyrightBill2017\\_UCTsubmission072017.pdf](http://ip-unit.org/wpcontent/uploads/2017/07/CopyrightBill2017_UCTsubmission072017.pdf)

WIPO 'Agreed Statement Concerning the WIPO Copyright Treaty' (1996) available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295456](http://www.wipo.int/treaties/en/text.jsp?file_id=295456)

WIPO *WIPO Studies on the Economic Contribution of the Copyright Industries: An Overview* (2014)

## **B. Books**

Adewopo, A *Nigerian Copyright System: Principles and Perspectives* (2012)

ARL *Minutes of the 21st Meeting* (1993)

Armstrong, C et al *Access to Knowledge in Africa: The Role of Copyright* (2010)

Asein, JO *Nigerian Copyright Law and Practice* (2012)

Atsegbua, L *Administrative Law: An Introductory Text* (2012)

Baloyi, JJ and Hooijer, R *Collective Management Organisations – Tool Kit: Musical Works and Audio-Visual Works* (2016)

Baloyi, JJ and Hooijer, R *Collective Management Organisations – Tool Kit: Neighbouring Rights* (2016)

Bowman, WS *Patent and Antitrust Law: A Legal and Economic Appraisal* (1973)

Craig, P *Administrative Law* 6th (2008)

Dean, OH *Handbook of South African Copyright Law* (2015)

Drexler, J (ed.) *Research Handbook on Intellectual Property and Competition Law* (2008)

Ficsor, M *Collective Management of Copyright and Related Rights* (2002)

Geist, M (ed.) *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013)

Gray, E et al *Publishing and Alternative Licensing Models in Africa: Comparative Analysis of the South African and Ugandan PALM Studies* (2010)

Gustavo, G *Intellectual Property and Competition Law: The Innovation Nexus* (2006)

HFEFP *Collecting Societies and Cultural Diversity in the Music Sector* (2009)



- Hovenkamp, H et al *IP and Antitrust: An analysis of antitrust principles applied to intellectual property law* (2010)
- Koskinen-Olsson, T and Lowe, N *Educational Material on Collective Management of Copyright and Related Rights (Module 1)* (2012)
- Koskinen-Olsson, T and Lowe, N *Educational Materials on Collective Management of Copyright and Related Rights (Modules 2-6)* (2012)
- Koskinen-Olsson, T *Collective Management in Reprography* (2005)
- Oakley, AJ *Parker and Mellows: The Modern Law of Trusts* 9th ed. (2008)
- Okoroji, T *Copyright Neighbouring Rights and the ne Millionaires: The Twists and Turns in Nigeria* (2008)
- Ola, O *Copyright Collective Administration in Nigeria: Lessons for Africa* (2013)
- Oyewunmi, AO *Nigerian Law of Intellectual Property* (2015)
- Patterson, LR and Lindberg, SW *The Nature of Copyright: A Law of Users' Rights* (1991)
- Perloff, J *Macroeconomics* (2012)
- Sinacore-Guinn, D *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations* (1993)
- Stoll, P et al (eds) *WTO-Trade related aspects of intellectual property rights* (2009)
- Sutherland, P and Kemp, K *Competition law of South Africa* (2000)
- Torremans, P (ed.) *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (2004)
- Uchtenhagen, U *Copyright Collective Management in Music* (2011)
- Uchtenhagen, U *The Setting-up of New Collecting Societies* (2005)
- van der Merwe, A et al *Law of Intellectual Property in South Africa* 2nd (2016)
- Wade, HWR and Forsyth, CF *Administrative Law* 9th (2004)
- Watt, R *Collective Management as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights* (2016)

### C. Book Chapters

Adewopo, A 'Developments in Collective Administration of Copyright, Licensing and Tariff Setting under Nigerian Copyright Law and Regulation' in DCJ Dakas et al (eds.) *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (2016) 677-700

Adewopo, A 'Legal Recognition of Collecting Societies under the Copyright (Amendment) Act 1992' in MA Ikhariale (ed.) *LASU Law and Development* (1996) 86

Adewopo, A 'Proposals for Liberalisation of Collecting Societies in Nigeria' in J Asein and E Nwauche eds. *A Decade of Copyright Law in Nigeria* (2002) 143-151

Baloyi, J and Pistorius, T 'Collective Management in Africa' in D Gervais (ed.) 3rd ed. *Collective Management of Copyright and Related Rights* (2015) 369-424

Chin, YW 'Copyright collective management in the twenty-first century from a competition law perspective' in S Frankel and D Gervais eds. *The Evolution and Equilibrium of Copyright in the Digital Age* (2015) 269-284.

Drexler, J 'Competition in the field of collective management: preferring creative competition to allocative efficiency in European copyright law' in P Torremans (ed.) *Copyright Law – A Handbook of Contemporary Research* (2007) 225

Engelbrekt, AB 'Toward Network Governance of Collective Management Organisations in Europe: The Problem of Institutional Diversity' in G Karnell, et al (eds.) *Liber Amicorum Jan Rosen* (2016) 61-100

Ficsor, M 'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire' in D Gervais (ed.) *Collective Management of Copyright and Related Rights* (2010) 29-76

Fletcher, A and Jardine, A 'Towards an Appropriate Policy for Excessive Pricing' in CD Ehlermann and M Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (2008) 533

Frabboni, MM 'The Changing Market for Music Licensing: A Redefinition of Collective Interests and Competitive Dynamics' in A Flanagan and ML Montagnani (eds.) *Intellectual Property Law: Economics and Social Justice Perspectives* (2010) 144-162

Gendreau, Y 'Walking the Copyright Tightrope' in P Torremans (ed) 2nd ed. *Research Handbook on Copyright Law* (2017) 1-30

Gervais, D 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D Gervais (ed.) *Collective Management of Copyright and Related Rights* (2010) 1-28

Gervais, DJ 'Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing' in M Geist (ed.) *In the Public Interest: The Future of Copyright Law in Canada* (2005) 517-549

Guibault, L 'The Draft Collective Management Directive' in I Stamatoudi and P Torremans (eds.) *EU Copyright Law: A Commentary* (2014) 763

Guibault, L and van Gompel, S 'Collective management in the European Union' in D Gervais (ed.) *Collective Management of Copyright and Related Rights* (2010) 135-168

Guibault, L and van Gompel, S 'Collective management in the European Union' in D Gervais D Gervais (ed.) 3rd ed. *Collective Management of Copyright and Related Rights* (2016) 139-174

Helfer, LR 'Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited' in D Gervais (ed.) *Collective Management of Copyright and Related Rights* (2010) 75-104

Hietanen, H 'Collecting societies and creative commons licensing' in Bourcier, D et al (eds.) *Managing Creative Works in a Digital World* (2010) 199-222

Hugenholtz, PB 'Codes of Conduct and Copyright Enforcement in Cyberspace' in IA Stamatoudi (ed.) *Copyright Enforcement and the Internet* (2010) 303-320

Katz, A 'Commentary: is collective administration of copyrights justified by the economic literature?' M Boyer, et al (eds.) *Competition Policy and Intellectual Property* (2009) 449-468

Katz, A 'Copyright and competition policy' in R Towse and C Handke eds. *Handbook of the Digital Creative Economy* (2013) 209-221

Katz, A 'Copyright collectives: good solution but for which problem?' in H First, et al (eds.) *Working Within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (2010) 295-430

Katz, A 'Copyright collectives: good solution but for which problem?' in H First, et al (eds.) *Working Within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (2010) 295-430

- Koelman, KJ 'Regulation of Collecting Societies' in B Hugenholtz et al (eds.) *A century of Dutch Copyright Law* (2012) 477-504
- Kretschmer, M and Kawohl, F 'The History and Philosophy of Copyright' in S Firth and L Marshall (eds) *Music and Copyright* (2004) 21-53
- Lopez-Sintaz, J *et al* 'The Social Construction of Music Markets: Copyright and Technology in the Digital Age' in J Lopez-Sintaz (ed.) *The Social Construction of Culture Markets: Between Incentive to Creation and Access to Culture* (2015) 101-121
- Netanel, NW 'Copyright and 'market power' in the market place of ideas' in F Macmillan (ed) *New Directions in Copyright Law* Vol 4 (2007) 149-179
- Mazziotti, G 'New licensing models for online music services in the European Union: from collective to customized management' (2011) 34(4) *CJLA* 757-808
- Merges, RP 'Property Rights Theory and the Commons: The case of Scientific Research' in EF Paul, et al (eds.) *Scientific Innovation, Philosophy, and Public Policy* (1996) 145-167
- Motta, M and de Streel, A 'Exploitative and Exclusionary Excessive Prices in EU Law' in CD Ehlermann and I Atanasiu (ed), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (2006) 91
- Motta, M and de Streel, A 'Excessive Pricing in Competition Law: Never Say Never?' in Swedish Competition Authority (ed) *The Pros and Cons of High Prices* (2007) 14
- Opadere, OS 'Complexities of Copyright Collective Management in Nigeria Vis-à-vis the Desire for Economic Development' in E Azinge and H Chuma-Okoro (eds.) *Intellectual Property and Development: Perspectives of African Countries* (2013) 287-316
- Paulis, E 'Article 82 and Exploitative Conduct' in CD Ehlermann and I Atanasiu (ed) *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (2006) 515
- Suthersanen, U 'The Role and Structure of the United Kingdom Copyright Tribunal' in Y Gendreau (ed.) *Copyright Administrative Institutions* (2002) 481-504
- Tong, L 'The Interface between Intellectual-property Rights and Human Rights' in H Klopper, et al (eds.) *Law of Intellectual Property in South Africa* (2011) 433-473

Woods, T 'Territorial Licensing and Evolving Roles of Collective Management Organizations' in D Gervais (ed.) *Collective Management of Copyright and Related Rights* (2010) 105-133

#### **D. Journal Articles**

Abrams, HB 'Originality and creativity in copyright law' (1992) 55(2) *LCP* 3-44

Adewopo, A 'Analysis of copyright in digital music: implications for new media licensing for ringtones under the Nigerian Copyright Act' (2017) 8(1) *GRBPL* 1-23

Afori, OF 'Human rights and copyright: the introduction of natural law consideration into American copyright law' (2004) 14(2) *FIPMELJ* 497-568

Aitman, D and Jones, A 'Competition law and copyright: has the copyright owner lost the ability to control his copyright?' (2004) 26(3) *EIPR* 137-147

Alford, DE 'Negotiating and analyzing electronic license agreements' (2002) 94(4) *LLJ* 621-644

Akman, P 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29(2) *Oxford Journal of Legal Studies* 267-303

Ani, L 'Rethinking competition law and policy: Building a framework for implementation in Nigeria' (2011) *NJBL* 1-26

Baloyi, JJ 'The protection and licensing of music rights in Sub-Saharan Africa: challenges and opportunities' (2014) 14(1) *JMEIEA* 61-87

Band, J and Butler, B 'Some cautionary tales about collective licensing' (2013) 21(3) *Michigan State International Law Review* 687-728

Bazuaye, B and Oriakhogba, D 'Combating corruption and the role of the judiciary in Nigeria: beyond rhetoric and crassness (2016) 42(1) *CLB* 125-147

Besen, SM et al 'An economic analysis of copyright collectives (1992) 78(1) *VLR* 383-411

Bodo, B et al 'Blockchain and smart contracts: the missing link in copyright licensing?' (2018) *International Journal of Law and Information Technology* 1-26

Brand, J 'Intellectual Property and the abuse of dominant position in South African Competition law' (2005) 122(4) *SALJ* 907-928

- Bulayenko, O 'Permissibility of non-voluntary collective management of copyright under EU law – the case of the French Law on out-of-commerce books' (2016) 7(1) *JIPIEL* 51-68
- Calabresi, G and Melamed, AD 'Property rules, liability rules and inalienability: one view of the cathedral' (1972) 85(6) *Harvard LR* 1089-1128
- Coase, RH 'The problem of social cost' (1960) 3 *JLE* 1-44
- Craig, CJ 'The evolution of originality in Canadian copyright law: authorship, reward and the public interest' (2005) 2(2) *UOLTJ* 425-445
- Cross, JT and Yu, PK 'Competition law and copyright' (2008) 56 *Dr. LR* 427-462
- Davids, DW 'Law and administrative discretion' (1994) 2(1) *IJGLS* 191-206
- Day, BR 'Collective management of music copyright in the digital age: the online clearinghouse' (2010) 18(2) *TIPLJ* 195-236
- Dean, O 'Sound recordings in South Africa: the Cinderella of the copyright family' (1993) *De Rebus* 913-917
- Dean, OH 'The case for recognition of intellectual property in the Bill of Rights' (1997) 60 *JCRL* 105-119
- Dent, C '“Generally inconvenient”: the 1624 *Statute of Monopolies* as political compromise' (2009) 33 *MULR* 415-453
- Dietz, A 'Legal regulation of collective management in Western and Eastern Europe' (2002) 49 *JCSU* 897-916
- Dietz, A 'The European Commission's proposal for a directive on collecting societies and cultural diversity – a missed opportunity' (2014) 3(1) *IJMBR* 7-25
- Drassinower, A 'Sweat of the brow, creativity, and authorship: on originality in Canadian copyright law' (2003-2004) 1 *UOLTJ* 105-12
- Ergas, H 'Why Johnny can't regulate: the case of natural monopoly' (2013) 20(1) *Agenda: A Journal of Policy Analysis and Reform* 47-54
- Evans, DS and Padilla, AJ 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1 *Journal of Competition Law and Economics* 97
- Ezrachi, A and Gilo, D 'Are Excessive Prices Really Self-Correcting?' (2009) 5 *Journal of Competition Law and Economics* 249

- Fabian, E 'Blockchain, digital music and lex mercatoria' (2017) 14 *US-China Law Review* 852-863
- Faturoti, B 'Re-importing the concept of 'authorisation' of copyright infringement to Nigeria from the UK and Australia' (2017) 31(1) *IRLCT* 4-25
- Fellmeth, AX 'Copyright misuse and the limits of intellectual property monopoly' (1998) 6(1) *JIPPL* 1-40
- Flynn, S 'Copyright legal and practical reform for the South African film industry' (2015) 16 *AJIC*
- Flynn, S et al 'An economic justification for open access to essential medicine patents in developing countries' (2009) 37 *JLME* 184-20
- Fujitani, JM 'Controlling the market powers of performing rights societies: an administrative substitute for antitrust regulation' (1984) 27 *Cal LR* 103-137
- Furnival, A 'The economics of collective copyright' (2015) 33(2) *CR*
- Gallini, N 'Competition policy, patent pools and copyright collectives' (2011) 8(2) *RERCI* 3-34
- Gervais, D and Maurushat, A 'Fragmented copyright, fragmented management: proposals to defrag copyright management' (2003) 2(1) *CJLT*
- Gervais, DJ 'Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective' (2002) 1(2) *CJLT* 21-50
- Gervais, DJ 'Feist goes global: A comparative analysis of the notion of originality in copyright law' (2002) 49(4) *JCSU* 949-981
- Gervais, DJ 'Making copyright whole: A principled approach to copyright exceptions and limitations' (2008) 5(1&2) *UOLTJ* 1-41
- Gervais, DJ 'The landscape of collective management schemes' (2011) 34(4) *CJLA* 423-449
- Gianino, M 'Regulated Industries: Abuse of Dominant Position in the Market for Block Train Services (France)' (2013) 4(6) *Journal of European Competition Law and Practice* 498
- Ghosh, S 'Decoding and recoding natural monopoly, deregulation, and intellectual property' (2008) 4 *University of Illinois Law Review* 1125-1184

- Goyder, J ‘*Cet Obscur Objet: Object Restrictions in Vertical Agreements*’ (2011) 2(4) *Journal of European Competition Law and Practice* 327-339
- Graber, CB ‘Collective rights management, competition policy and cultural diversity: EU lawmaking at a crossroads’ (2012) 4(1) *The WIPOJ* 35-49
- Harms, LTC ‘“Originality” and “Reproduction” in copyright law with special reference to photographs’ (2013) 16(5) *PER/PELJ* 488-513
- Haunss, S ‘The changing role of collecting societies in the internet’ (2013) 2(3) *IPR*
- Hou, L ‘Excessive Prices Within EU Competition Law’ (2011) 7(1) *European Competition Journal* 47-70
- Hviid, M et al ‘Regulating CMOs by competition: an incomplete answer to the licensing problem?’ (2016) 7(3) *JIPITEC* 256-270
- Jiang, Y ‘The changing tides of collective licensing in China’ (2013) 21 (3) *MSILR*
- Jones, A and Davies, J ‘Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate’ (2014) 10(3) *European Competition Journal* 453-497
- Kajela, AA ‘Collective management of copyright: more than two centuries of existence in history; two years old in Ethiopia’ (2016) 3(12) *IJRSI*
- Karjiker, S ‘Justifications for copyright: the economic justification’ (2014) 2 *SAIPLJ* 13-41
- Karjiker, S ‘Justifications for copyright: The moral justification’ (2013) 1 *SAIPLJ* 42
- Karjiker, S ‘The first-sale doctrine: parallel importation and beyond’ (2015) *Stell LR* 633
- Karnell, G ‘Collective administration of authors’ rights’ (1986) 2 *CMRWIPO* 45-66
- Katz, A ‘Making sense out of nonsense: intellectual property, antitrust, and market power’ (2007) 49 *ALR* 837-909
- Katz, A ‘Specter: Canadian copyright and the mandatory tariff-part I’ (2015) 27 *IPJ* 151-211
- Katz, A ‘Spectre: Canadian copyright and the mandatory tariff-part II’ (2015) 28 *IPJ* 39-99
- Katz, A ‘Substitution and Schumpeterian effects over the life cycle of copyrighted works’ (2009) 49 *Jurimetrics* 113-153



Katz, A 'The potential demise of another natural monopoly: new technologies and the administration of performing rights' (2006) 2(2) *JCLE* 245-284

Katz, A 'The potential demise of another natural monopoly: Rethinking the collective administration of performing rights' (2005) 1(3) *JCLE* 541-593

Katz, A and Veer, P 'Beyond refusal to deal: a cross-atlantic view of copyright, competition and innovation policies' (2013) 79 *ALJ* 139-184

Kobayashi, BH 'Opening Pandora's Black Box: a Coasian 1937 view of performing rights organizations in 2014' (2015) 22(4) *GMLR* 925-942

Koch, CH 'Judicial review of administrative action' (1986) 54(4) *The George Washington Law Review* 469-511

Krisjanis, B 'Copyright and free speech: the human right perspective' (2015) 8(2) *BJLP* 182-202

Kwall, RS 'Originality in context' (2007) 44(4) *HLR* 871-899

Landes, WM and Posner, RA 'An economic analysis of copyright law' (1989) 18(2) *JLS* 325-363

Lewinski, SV 'Mandatory collective administration of exclusive rights – a case study on its compatibility with international and EC copyright law' (2004) 1 *UNESCO e.Copyright Bulletin* 1-14

Lim, G and Min, Y 'Competition and Corporate Governance: Teaming Up to Police Tunneling' (2016) 36(2) *Northwestern Journal of International Law & Business* 267-301

Lindsay, D 'Protection of compilations and databases after IceTV: Authorship, originality and the transformation of Australian copyright law' (2012) 38(1) *MULR* 17-59

Liu, W 'Models for collective management of copyright from an international perspective: potential changes for enhancing performance' (2012) 17 *JIPR* 46-54

Loren, LP 'The nature of copyright: a law of users' rights by L. Ray Patterson and Stanley W. Lindberg' (1992) 90(6) *MLR* 1624-1633

Luiz, S and Taljaard, Z 'Mass resignation of Board and Social Responsibility of the Company: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*' (2009) 21 *SAMLJ* 420-425

- Masango, CA 'The future of the first sale doctrine with the advent of license to govern access to digital content' (2006) 7 *SAJICI* 64-73
- McGivern, JM 'A performing rights organization perspective: the challenges of enforcement in the digital environment' (2011) 34(4) *CJLA* 631-643
- Mendis, D and Stobo, V 'Extended collective licensing in the UK – one year on: a review of the law and a look ahead to the future (2016) 4(38) *EIPR* 208-220
- Modrall, J 'Big Data and Merger Control in the EU' (2018) 9(9) *Journal of European Competition Law and Practice* 569-578
- Nair, RD et al 'The inter-relationships between regulation and competition enforcement in the South African liquid fuels industry' (2015) 26(1) *Journal of Energy in Southern Africa* 11-19
- Ncube, CB 'Copyright enforcement: the graduated response takes centre stage (2012) 24 *SAMLJ* 133-147
- Ncube, CB and Oriakhogba, DO 'Monkey selfie and authorship in copyright law: focus Nigeria and South Africa' (2018) 21 *PER/PELJ* available at <https://journals.assaf.org.za/index.php/per/article/view/4979/7393>, accessed on 31 December 2018
- Nimmer, D 'Copyright in the Dead Sea Scrolls: authorship and originality' (2001) 38 *HLR* 1
- Nzomo, VB 'Rethinking the regulation of collective management organisations in Africa: legislative lessons from Kenya, South Africa and Nigeria' (2016) 1(1) *AJIP* 1-18
- Obayemi, OK 'Competition in the Nigerian telecommunications industry' (2014) 5 *BLR* 283-298
- Odion, JO and Oriakhogba, DO 'Copyright collective management organizations in Nigeria: Resolving the *locus standi* conundrum' (2015) 10(7) *JIPLP* 518-525
- Odunaike, DA 'Comparative analysis of collective administration of performance in Australia and Nigeria' (2015) 1&2 *IJCL* 254-269
- Oguamanam, C 'Beyond Nollywood and piracy: in search of an intellectual property policy in Nigeria' (2011) *NJIP* 3-37
- Okorie, CI 'Corporate governance of collecting societies in Nigeria: powers of the copyright sector regulator' (2018) 6 *SAIPLJ* 24

Okorie, C 'Nigerian Supreme Court issues guidance on *locus standi* of collecting societies' (2018) 13(12) *JIPLP* 931

Ola, O 'Copyright collective administration in Nigeria: regulatory challenges' (2013) 2(1) *NJIP* 84-120, 87

Olatunji, OA 'Copyright regulations under the Nigerian Copyright Act: a critical analysis' (2013) 2(1) *NJIP* 47-81

Olatunji, OA et al 'Collective management of rights in musical works and sound recordings: a critique of the Copyright Society of Nigeria' (2017) *IIC* 1-26

Olatunji, OA et al, 'The legality and signification of the AGF's directive approving a second musical CMO in Nigeria' (2018) *IIC* <https://doi.org/10.1007/s40319-018-0771-6> accessed 31 December 2018

Olubiyi, IA and Adams, KI 'An examination of the adequacy of the regulation of collecting societies in Nigeria (2017) 5 *SAIPLJ* 87-112

Onyido, J 'Copyright Collective Rights Management in Nigeria' (2017) *The Copyright Law* 38-40

Oriakhogba, DO 'Authorship, ownership and enforcement of copyright: the Nigerian situation' (2015) 3 *SAIPLJ* 40-54

Oriakhogba, DO 'Copyright collective management organizations in Nigeria: the *locus standi* conundrum resolved?' (2019) 14(2) *JIPLP* 127-135

Oriakhogba, DO and Erhagbe, E 'How the Nigerian Supreme Court finally resolved the copyright collective management organisations' *locus standi* conundrum' (2019) *JIPLP* (forthcoming)

Oriakhogba, DO and Fenemigho, AI 'Development, concept and scope of copyright protection in Nigeria: An overview' (2014) 5 *NAUJILJ* 179-191

Oyewunmi, AO 'Towards sustainable development of Nigeria's entertainment industry in the digital age: role of copyright law and administration' (2011) *NJIP* 74-102

Pager, SE 'Accentuating the positives: building capacity for creative industries into the development agenda for global intellectual property law' (2012) 28(1) *AUILR* 223-296

Pitt, IL 'Superstar effects on royalty income in a performing rights organisation' (2010) 34(3) *JCE* 219-236.

Porcin, A 'Of guilds and men: copyright workaround in the cinematographic industry' (2012) 35(1) *HCELJ* 1-34

Raju, KD 'Interface between competition law and intellectual property rights: A comparative study of the US, EU and India' (2014) 2(3) *IPR* 115

Reddick, EN 'Joint Ventures and Other Competitor Collaborations as Single Entity "Undertakings" Under US Law' (2012) 8(2) *European Competition Journal* 333-363

Riby-Smith, M 'South African Copyright law – the good, the bad and the Copyright Amendment Bill' (2017) 12(3) *JIP LAP* 216-225

Ricketson, S 'The concept of originality in Anglo-Australian copyright law' (1991-1992) 39 *JCSU* 265

Riis, T 'Collecting societies, competition, and the service directives' (2011) 6(7) *JIPLP* 482-492

Riis, T and Schovsbo, J 'Extended collective licenses and the Nordic experience – it's a hybrid but is it a Volvo or a lemon?' (2010) 31(4) *CJLA* 441

Riis, T and Schovsbo, J 'Extended collective licenses in action' (2012) 43(8) *IIC* 930-950

Rutschman, AS 'Weapons of mass construction: the role of intellectual property in Nigeria's film and music industries' (2015) 29 *EILR* 673-704

Schild, AL 'Collecting societies and competition law: an overview of EU and national case law' (2012) *e-Competitions Competition Law Bulletin* 1-17

Schroff, S and Street, J 'The politics of the Digital Single Market: culture vs. competition vs. copyright' (2017) *ICS* 1-17

Seeber, M 'Perspective on copyright' (1998) 7(6) *APR* 13

Sidak, JG and Teece, DJ 'Dynamic competition in anti-trust law' (2009) 5(4) *JCLE* 581-631

Spirer, JH 'In re Johannesburg Operatic and Dramatic Society v Music Theatre International: Boycott of the South African Stage' (1970) 20 *CLS* 140-153

Stallberg, CG 'Towards a new paradigm in justifying copyright: an universalistic-transcendental approach' (2007) 18(2) *FIPMELJ* 333-381

Steyn, JR 'Copyright tribunal's first case' (1969) *De Rebus* 69

- ten Have, F and de Jong, S ‘*Orange Polska v Commission: Abuse of Dominance, Fines & Effects*’ (2018) 9(10) *Journal of European Competition Law and Practice* 647
- Thakker, K ‘The conflict between E.U. collecting societies and E.C. competition law’ (2009) 16 *CJEL* 121-129
- Tollison, RD and Wagner, RE ‘The logic of natural monopoly regulation’ (1991) 17(4) *Eastern Economic Journal* 483-490
- Tom, WK and Newberg, JA ‘Antitrust and intellectual property: from separate spheres to unified fields’ (1997) 66(1) *ALJ* 167-229
- Ukwa, NJ and Okolie, UC ‘Visual arts: a strategic tool for youth unemployment reduction and economic development’ (2014) 1 *IJRRE* 11-16
- Vaver, D ‘Copyright defences as user rights’ (2013) 60(4) *JCSU* 661-672
- Verronen, V ‘Extended collective licence in Finland: a legal instrument for balancing the rights of the author with the interests of the user’ (2002) 49 *JCSU* 1143-1160
- Vogel, L and Vogel, J ‘Survey on Vertical Agreements in 2017 – Is the Rigid Application of Competition Law to Distribution Agreements Going to Kill the Buyer–Reseller Model?’ (2017) 8(9) *Journal of European Competition Law and Practice* 604-612
- Waller, SW ‘Corporate governance and competition policy’ (2011) 18(4) *George Mason Law Review* 833-887
- Wallis, R et al ‘Contested collective administration of intellectual property rights in music: the challenges to the principles of reciprocity and solidarity’ (1999) 14(1) *EJC* 5-35
- Watt, R ‘The efficiencies of aggregation: an economic theory perspective on collective management of copyright’ (2015) 12(1/2) *RERCI* 26-44
- Zhang, Z ‘Rationale of collective management organizations: an economic perspective’ (2016) 10(1) *MUJLT* 73-111

## **E. Other Articles**

- Abi, S ‘The gleeful sounds of Nigeria’ (2014) 6 available at <https://skriblurshaven.files.wordpress.com/2014/06/the-gleeful-soundz-of-nigeria.pdf>

ACE 'Use of copyrighted music on college and university campuses' (2013) available at <http://www.acenet.edu/news-room/Documents/Music-use-of-copyright.pdf>

Adewole, CM et al 'The management of copyright in the creative country industry in Nigeria: nollywood experience' 6 available at [http://umconference.um.edu.my/upload/43-1/papers/286%20Adelowo\\_Egbetokun\\_Oluy\\_Abolaji\\_Siyanbola.pdf](http://umconference.um.edu.my/upload/43-1/papers/286%20Adelowo_Egbetokun_Oluy_Abolaji_Siyanbola.pdf)

Adewopo, A 'Music Lesson and Collective Administration' (2014) available at <https://nec.ng/music-lesson-and-collective-administration-adebambo-adewopo/>

Adler, P et al 'Fair use challenges in academic and research libraries' (2010) *Association of Research Libraries* available at [http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pjip\\_copyright](http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pjip_copyright)

Akman, P and Garrod, L 'When are Excessive Prices Unfair? (2010) *CCP Working Paper 10-4* available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1578181](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578181), accessed on 4 March 2019

Andersen, B et al 'Copyrights, competition and development: the case of the music industry (2000) available at [http://unctad.org/en/docs/dp\\_145.en.pdf](http://unctad.org/en/docs/dp_145.en.pdf)

ARL et al 'Code of best practices in fair use for academic and research libraries' (2012) available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>

Band, J and Butler, B 'Some cautionary tales about collective rights organizations, part 2' (2018) available at <http://infojustice.org/archives/39886>

Congedo, P 'The "regulatory authority dixit" defence in European competition law enforcement' (2014) MPRA Paper No. 60239 available at [https://mpra.ub.uni-muenchen.de/60239/1/MPRA\\_paper\\_60239.pdf](https://mpra.ub.uni-muenchen.de/60239/1/MPRA_paper_60239.pdf), accessed on 1 March 2019

Depooter, BWF 'Regulation of Natural Monopoly' (1999) available at <https://reference.findlaw.com/lawandeconomics/5400-regulation-of-natural-monopoly.pdf>, accessed on 5 March 2019

de Streel, A 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' (2008) available at <https://pdfs.semanticscholar.org/2d16/db27d8d021ff051e653cfd039549664b8453.pdf>, accessed on 1 March 2019

Drexler, J 'Collecting societies and competition law' (2007) 6 available at [http://www.ip.mpg.de/shared/data/pdf/drexler-crms\\_and\\_competition.pdf](http://www.ip.mpg.de/shared/data/pdf/drexler-crms_and_competition.pdf) (in file with author)

du Plessis, D ‘Performing Rights – part 2’ (2008) available at [https://www.sampra.org.za/downloads/asa\\_oct\\_08.pdf](https://www.sampra.org.za/downloads/asa_oct_08.pdf)

Ezeilo, O ‘Overview of the publishing industry and legal basis for collective management in Nigeria’ (2013) 16 available at [http://www.ifrro.org/sites/default/files/2\\_Ezeilo.pptx](http://www.ifrro.org/sites/default/files/2_Ezeilo.pptx).

Ficsor, M ‘Collective management of copyright and related rights at a triple crossroads: should it remain voluntary or may it be “extended” or made mandatory?’ (2003) available at [http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor\\_Eng.pdf/Ficsor%2BEng.pdf](http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor_Eng.pdf/Ficsor%2BEng.pdf)

Fisher, W ‘Theories of intellectual property law’ available at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>

Geradin, D ‘The Necessary Limits to the Control of ‘Excessive’ Prices by Competition Authorities—A View from Europe’ (2007) *Tilburg University Legal Studies Working Paper* available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022678](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022678), accessed 4 March 2019.

Gervais, D ‘Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation’ (2003) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1920391](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920391)

Ghosh, P ‘Judicial review of administrative discretion in India – essay’ available at <http://www.shareyouressays.com/120560/judicial-review-of-administrative-discretion-in-india-essay>

Ghosh, RA ‘An economic basis for open standards’ (2005) available at [https://www.intgovforum.org/Substantive\\_1st\\_IGF/openstandards-IGF.pdf](https://www.intgovforum.org/Substantive_1st_IGF/openstandards-IGF.pdf), accessed on 1 March 2019

Gilfillan, G ‘Clarifying the history, roles, responsibilities and regulatory environment concerning collecting societies in South Africa’ (2010) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2010/101020clarifying.pdf>

Gilfillan, G ‘The black box practice – part 2: royalty distribution practices at one CMO SAMRO concerning works where there is insufficient information’ (2013) available at <http://www.nisaonline.com/index.php/documents>

Handke, C ‘Joint copyrights management by collecting societies and online platforms: an economic analysis’ (2016) available at [http://eventos.uva.es/file\\_manager/get\\_paper/4678](http://eventos.uva.es/file_manager/get_paper/4678)

Handke, C ‘The economics of collective copyright management’ (2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2256178](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256178)

Hansen, G and Schmidt-Bischoffshuansen, A ‘Economic functions of collecting societies – collective rights management in transaction cost – and information economics’ (2007) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=998328](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998328)

Hellwig, M ‘Competition Policy and Sector-Specific Regulation for Network Industries’ (2008) available at <https://pdfs.semanticscholar.org/b0ae/a9587db5efbcbd8b21ba5aeb3b6bc67a82f6.pdf>, accessed on 1 March 2019

Hofman, J and Schonwetter, T ‘International agreements, national fair use legislation and copyright royalty collection agents’ (2006) available at <http://pcf4.dec.uwi.edu/viewabstract.php?id=255>

Idigbe, A and Foy-Yamah, O ‘Nigeria’ in ICLG A Practical Cross-Border Insight into International Arbitration (2010) available at [http://www.punuka.com/uploads/arbitration\\_agreements.pdf](http://www.punuka.com/uploads/arbitration_agreements.pdf)

Joskow, PL ‘Regulation of natural monopolies’ (2005) available at <https://economics.mit.edu/files/1180>, accessed 5 March 2019

Karjiker, S ‘Needletime Royalties’ (July 2015) *Without Prejudice* 55-57

Katz, A and Sarid, E ‘Who killed the radio star? How music blanket licenses distort the production of music content’ (2017) 19 available at <http://serci.org/wp-content/uploads/2017/10/Katz-Sarid.pdf>

Knopf, HP ‘Canadian copyright collectives and the copyright board: a snap shot in 2008’ (2008) available at [http://www.macerajarzyna.com/pages/publications/Knopf\\_Canadian\\_Copyright\\_Collectives\\_Copyright\\_Board\\_Feb2008.pdf](http://www.macerajarzyna.com/pages/publications/Knopf_Canadian_Copyright_Collectives_Copyright_Board_Feb2008.pdf)

Kretschmer, M ‘Access and reward in the information society: regulating the collective management of copyright’ (2007) available at <http://eprints.bournemouth.ac.uk/3695/1/CollSoc07.pdf>

Kumi-Atiemo, A ‘Collective management of copyright and related rights in music – a case study of the United Kingdom and Ghanaian System’ available at <https://www.squ.edu.om/Portals/65/Documents/Resources/WIPO%20Publication.pdf>



Kur, A and Schovsbo, J 'Expropriation or fair game for all? The gradual dismantling of the IP exclusivity paradigm' (2009) available at <http://ssrn.com/abstract=1508330>

Kwanashie, M et al 'The impact of the arts, culture and creative industry on Nigeria's economy' (2009) available at <http://www.uis.unesco.org/culture/Documents/nigeria-pilot-research-impact-study-culture-industries-2009.pdf>

Lenard, TM and White, MJ 'Moving Music Licensing into the Digital Era: More Competition and Less Regulation' (2015) available at [http://www.cresse.info/uploadfiles/2016\\_pl1\\_pa1.pdf](http://www.cresse.info/uploadfiles/2016_pl1_pa1.pdf)

Lorrain, A 'Governing collective rights management of copyright protected resources, or how building upon copyright collectivisation' (2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2398901](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398901)

Matzukis, N 'The Great South African Needletime Debacle' (2012) available at <http://www.posatrust.org.za/downloads/2012-05-26/Nick-Matzukis-Presentation.pdf>  
Nerrisson, S 'Social functions of collective management societies (CMS) provisory conclusions' (2007) available at [http://www.ip.mpg.de/shared/data/pdf/3\\_nerrisson\\_-\\_social\\_functions.pdf](http://www.ip.mpg.de/shared/data/pdf/3_nerrisson_-_social_functions.pdf)

Oh, E 'Nigeria's film industry: Nollywood looks to expand globally' (2014) available at [https://www.usitc.gov/publications/332/erick\\_oh\\_nigerias\\_film\\_industry.pdf](https://www.usitc.gov/publications/332/erick_oh_nigerias_film_industry.pdf)

Onyido, J et al 'Who is a proper plaintiff in an action for the enforcement of copyright in Nigeria: a review of the Nigerian Court of Appeal in Musical Copyright Society Nig. Ltd v Nigerian Copyright Commission' (2017) 4 available at <http://www.spaaajibade.com/resources/wp-content/uploads/2017/01/Proper-Plaintiff-in-an-Action-for-the-Enforcement-of-Copyrights-in-Nigeria-Review-of-the-decision-in-Musical-Copyright-Society-of-Nigeria-Ltd-v.-Nigeria-Copyright-Commission.pdf>

Rochelandet, F 'Are copyright collecting societies efficient? An evaluation of collective administration of copyright in Europe' (2002) available at <http://www.serci.org/2002/rochelandet.pdf>

Rossoglou, K 'Collective Management of Copyright and Related Rights and Multi-Territorial Licensing for Rights in Musical Works Online: Proposal for a Directive' (2013) 11 available at [https://ameliaandersdotter.eu/sites/default/files/beuc\\_-\\_crm.pdf](https://ameliaandersdotter.eu/sites/default/files/beuc_-_crm.pdf)

Samuelson, P 'Justification for copyright limitations & exceptions' available at [https://www.law.berkeley.edu/files/Justifications\\_for\\_Copyright\\_Limitations\\_and\\_Exceptions\\_-\\_Pamuela\\_Samuelson.pdf](https://www.law.berkeley.edu/files/Justifications_for_Copyright_Limitations_and_Exceptions_-_Pamuela_Samuelson.pdf)

Schovsbo, J ‘The necessity to collectivize copyright – and the dangers thereof’ (2010) available at [http://static-curis.ku.dk/portal/files/20596531/The\\_Necessity\\_to\\_collectivize\\_copyright\\_SSRN.pdf](http://static-curis.ku.dk/portal/files/20596531/The_Necessity_to_collectivize_copyright_SSRN.pdf)

Sodipo, B ‘FDI and Nigeria’s IP landscape’ (2017) available at <http://www.qmipri.qmul.ac.uk/docs/199218.pdf>

Tejan-Cole, A ‘Collective management of copyright and related rights’ available at <http://www.belipo.bz/wp-content/uploads/2011/12/collectivemanagementofcopyright.pdf>

Towse, R ‘Economics of copyright collecting societies and digital rights: is there a case for a digital copyright exchange’ (2012) available at <http://www.serci.org/2012/towse.pdf>

Towse, R ‘Managing copyrights in the cultural industries’ available at [http://neumann.hec.ca/aimac2005/PDF\\_Text/Towse\\_Ruth.pdf](http://neumann.hec.ca/aimac2005/PDF_Text/Towse_Ruth.pdf)

Towse, R and Handke, C ‘Regulating copyright collecting societies: current policy in Europe’ (2007) available at <http://www.serci.org/2007/towsehandke.pdf>

Wang, J ‘Should China adopt extended licensing system to facilitate collective copyright administration: preliminary thoughts’ available at [https://www.researchgate.net/publication/228172715\\_Should\\_China\\_Adopt\\_an\\_Extended\\_Licensing\\_System\\_to\\_Facilitate\\_Collective\\_Copyright\\_Administration\\_Preliminary\\_Thought](https://www.researchgate.net/publication/228172715_Should_China_Adopt_an_Extended_Licensing_System_to_Facilitate_Collective_Copyright_Administration_Preliminary_Thought)

## **F. Theses**

Adeniyi, AB ‘Towards a Harmonised Competition Law in Nigeria and on Foreign Direct Investment Inflow’ (unpublished LLM Thesis, University of Pretoria, 2016)

Karjiker, S ‘Open-source software and the rationale for copyright protection of computer programs’ (unpublished PhD Thesis, University of Stellenbosch, 2013)

Schonwetter, T ‘Safeguarding a fair copyright balance – contemporary challenges in a changing world: lessons to be learnt from a developing country’s perspective’ (unpublished PhD Thesis, University of Cape Town, 2009)

Schonwetter, T ‘The implications of digitizing and the Internet for “fair use” in South Africa’ (unpublished LLM Thesis, University of Cape Town, 2005)

Wagenaar, T 'A Comparative Analysis of the Development of Performers' Rights in the United Kingdom and South Africa' (unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2011)

### **G. Blogs, News reports and other Internet sources**

'Music Royalties Deal Breaks Competition Law, says Commission' 4 May 2004 Out-Law.com available at <http://www.out-law.com/page-4506>

7digital '7digital announce pan-African licensing agreement through CAPASSO' available at <http://about.7digital.com/news/7digital-announce-pan-african-licensing-agreement-through-capasso>

Afolabi, A 'The Nigeria printing industry in the globalization era' (2014) available at <https://www.thenigerianvoice.com/news/150341/the-nigerian-printing-industry-in-the-globalization-era.html>

Augoye, J 'Lagbaja in hot debate with Okoroji on royalty' (2014) available at <http://osbcng.org/2014/04/25/lagbaja-in-hot-debate-with-okoroji-on-royalty/>

Blignaut, C 'Gospel Shocker: how black musicians got screwed' *City Press* 1 April 2018

Callsheet '2016 film industry forecast' 10 December 2015 available at <http://www.thecallsheet.co.za/2016-film-industry-forecast/>

CAPASSO 'Our History' available at <http://www.capasso.co.za/index.php/about-us/our-history.html>

CAPASSO's Membership Rules available at <http://www.capasso.co.za/index.php/company-documents.html?download=23:capasso-membership-rules-2015>

CAPASSO's Memorandum of Incorporation available at <http://www.capasso.co.za/index.php/company-documents.html>

CDN 'Creative arts and culture' available at <https://cdnetng.org/?q=node/241>

Chahale, S 'An Overview on the Role of Contracts in Copyright Management' (2018) 26 *KECOBO CopyrightNews*

Channels TV ‘Intellectual Property: COSON, MCSN Fight Over Copyright Management’ available at <https://www.channelstv.com/2017/04/27/intellectual-property-coson-mcsn-fight-copyright-management/>

CISAC ‘AKKA-LAA (LATVIA)’ available at [http://www.cisac.org/Cisac-Home/Our-Members/Members-Directory/\(society\)/20/\(previous\\_url\)/3723](http://www.cisac.org/Cisac-Home/Our-Members/Members-Directory/(society)/20/(previous_url)/3723)

Coetzer, D ‘Two of South African Largest Royalty Collection Agencies Join Forces’ (2011) available at <http://www.billboard.com/biz/articles/news/publishing/1178131/two-of-south-africas-largest-royalty-collection-agencies-join>

COSON ‘COSON calls for day-long hunger strike by Nigerian musicians on “No Music Day”’ available at <http://www.cosonng.com/coson-calls-for-day-long-hunger-strike-by-nigerian-musicians-on-no-music-day/>

COSON ‘COSON Launches Nigeria’s First On-line Licensing Platform ‘CLAP’ available at <http://www.cosonng.com/coson-launches-nigerias-first-copyright-online-licensing-platform-clap-it-was-a-joyous-gathering-of-musicians-stakeholders-and-music-lovers-this-tuesday-november-8-201/>

COSON ‘Milestone in the Development of Music Copyright System in Nigeria’ available at <http://www.cosonng.com/milestone-in-the-development-of-the-music-copyright-system-in-nigeria/>

Enejeta, E ‘Nigeria’s \$7.2bn film industry gains traction in Europe’ *Financial Watch* 3 June 2016 available at <http://www.financialwatchngr.com/2016/06/03/nigerias-7-2bn-film-industry-gains-traction-europe/>

Fp&m Seta ‘A profile of the print, print media and publishing sub-sector’ (2014) available at [http://www.fpmseta.org.za/downloads/FPM\\_sub-sector\\_printing\\_print%20media\\_publishing\\_final.pdf](http://www.fpmseta.org.za/downloads/FPM_sub-sector_printing_print%20media_publishing_final.pdf)

<http://mplcsa.org/page/about-the-mplc>

<http://www.avrsnigeria.com/?q=page/audio-visual-rights-society-nigeria>

<http://www.copyright.go.ke/media-gallery/news-and-updates/319-music-copyright-society-of-kenya-mcsk-denied-licence.html>

<http://www.copyright.go.ke/media-gallery/news-and-updates/323-kecobo-approves-music-publishers-association-of-kenya-mpake-to-collect-royalties-for-authors-composers-and-publishers.html>

<http://www.kamp.or.ke/who-we-are/>

<http://www.za.ccli.com/about-us/>

<https://www.prisk.or.ke/index.php/en/>

IMPRA ‘Background/History of IMPRA’ available at

<https://www.impra.co.za/history/>

IPA ‘Copyright and Human Rights – An IPA Special Report’ (2015) available at

<http://www.internationalpublishers.org/images/Copyright.pdf>

Kay, C and Spillane, C ‘Moviemakers beg banks for cash as nollywood goes global’ 13 August 2013 Bloomberg available at

<https://www.bloomberg.com/news/articles/2013-08-12/moviemakers-beg-banks-for-cash-as-nollywood-goes-global>

Kerongo, G ‘CMOs Sign Joint Licensing Deal with Hotels and Pubs Association’ *The Star* 1 August 2017 available at [http://www.the-star.co.ke/news/2017/08/01/amos-sign-joint-licensing-deal-with-hotels-and-pubs-associations\\_c1608562](http://www.the-star.co.ke/news/2017/08/01/amos-sign-joint-licensing-deal-with-hotels-and-pubs-associations_c1608562)

Molobo, S ‘Drama at Artists’ Meeting’ *Daily Sun* 26 April 2018

NCC, <http://www.copyright.gov.ng/index.php/court-cases/court-cases-pending>

Ojeifo, O ‘Copyright: MCSN Presents Approved License to Stakeholders, Re-positions for Leadership’ available at <http://entrepreneurs-forum.com/2017/05/11/copyright-mcsn-presents-approved-license-to-stakeholders-re-positions-for-leadership/>

Okeke, C ‘Why Nigerians hardly appreciate works of arts’ 2 March 2014 Leadership Newspaper

Okorie, C ‘In-fighting at Nigeria’s main collecting society – powers of the regulator’ (2018) available at [http://ipkitten.blogspot.co.za/2018/03/infighting-at-nigerias-main-collecting.html?lipi=urn:li:page:d\\_flagship3\\_detail\\_base;lsNZyEVoSd2CQvFhao5hVA%3D%3D&licu=urn:li:control:d\\_flagship3\\_detail\\_base-object](http://ipkitten.blogspot.co.za/2018/03/infighting-at-nigerias-main-collecting.html?lipi=urn:li:page:d_flagship3_detail_base;lsNZyEVoSd2CQvFhao5hVA%3D%3D&licu=urn:li:control:d_flagship3_detail_base-object)

Olatunji, O ‘COSN vs MCSN – Why AGF’s directive is best for Nigeria’s music industry’ (2018) available at <http://nigerianlawtoday.com/coson-vs-mcsn-why-agfs-directive-is-best-for-nigerias-music-industry-by-olugbenga-olatumji/>

Oriakhogba, D ‘Balancing the copyright regime in South Africa: thinking outside the copyright box’ available at <https://ip-unit.org/2018/balancing-the-copyright-regime-in-south-africa-thinking-outside-the-copyright-box/>

Oriakhogba, D ‘Multichoice v MCSN: No CMO licence required for an exclusive assignee of copyright to enforce its licence’ (2018) available at <http://afro-ip.blogspot.co.za/2018/03/multichoice-v-mcsn-no-cmo-licence.html>

PLAC ‘Senate passes the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018’ (15 May 2018) available at <http://placng.org/wp/2018/05/senate-passes-the-companies-and-allied-matters-act-repeal-and-re-enactment-bill-2018/>

PMG ‘Parliamentary Portfolio Committee on Arts and Culture: Music Programmes and royalty payments: SA music rights organisation briefing’ (2015) available at <https://pmg.org.za/committee-meeting/20453/>

POSA, ‘Needletime Rights’ available at <http://www.posatrust.org.za/>

RAV, ‘About us’ available at [http://www.rav.org.za/about\\_us](http://www.rav.org.za/about_us)

REPRONIG ‘Members’ available at <http://repronig.ng/members/>

RiSA, ‘About us’ available at <http://www.risa.org.za/about-us>

SAMPRA, ‘Background’ available at <https://www.sampira.org.za/>

SAMPRA’s Memorandum of Incorporation (MOI) available at <https://www.sampira.org.za/pdf/moi/SAMPRA%20Memorandum%20of%20Incorporation.pdf>

SAMRO ‘How SAMRO deals with the challenge of multi-purpose licensing’ available at <http://www.samro.org.za/node/10775>

SAMRO ‘SAMRO turns up the volume in the outcry against music piracy’ available at <http://www.samro.org.za/SAMRO-anti-piracy-campaign>

SAMRO’s Performing Rights Distribution Rules available at <http://www.samro.org.za/sites/default/files/SAMRO%20Performing%20Rights%20Royalty%20Distribution%20Rules.pdf>

Salvade, V ‘Blockchain – an ending or future of collective management organisations’ available at <https://blog.suisa.ch/en/blockchain-an-ending-or-future-for-collective-management-organisations/>

Schierholz 'Preserving the social and cultural roles of collecting societies: particularities in the case of multi-territorial licensing' available at <http://hdap-alai.hr/wp-content/uploads/2014/05/7-10-schierholz-final.doc>

Shonwetter, T and Oriakhogba, D 'Data, databases and copyright protection in South Africa, part I' (2018) available at <http://ip-unit.org/2018/data-databases-and-copyright-protection-in-south-africa-part-i/#more-1942>

Shosanya, M 'Printing Industry is Dying, Cry Chartered Printers, Others' *Daily Trust Newspaper* 12 April 2015

Sunday, P 'Exclusive: why Tony Okoroji was removed as COSON chairman, replaced with Efe Omorogbe, plotted his reinstatement' available at <https://aledeh.com/exclusive-why-tony-okoroji-was-removed-as-coson-chairman-replaced-with-efe-omorogbe-plotted-his-reinstatement/>

Tagbor, T 'The Nigerian music industry: consequences of COSON and MCSN coexistence' (2017) available at <https://nlipw.com/wp-content/uploads/Consequences-of-COSON-and-MSCN-Coexistence-.pdf>

Wright, D 'Clarifying the pierce of needletime royalties' (2015) available at <http://thewritecandidate.co.za/clarifying-the-pierce-of-needletime-royalties/>